

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF TEXAS
3 SHERMAN DIVISION

4 THE STATE OF TEXAS, et al,

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5 Plaintiffs,

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6 vs.

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7 GOOGLE, LLC,

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8 Defendant.

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9 MOTION TO TRANSFER VENUE
10 TRANSCRIPT OF PROCEEDINGS
11 BEFORE THE HONORABLE SEAN D. JORDAN
12 UNITED STATES DISTRICT JUDGE

13 Thursday, March 18, 2021; 10:34 a.m.
14 Plano, Texas

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1 March 18, 2021

10:34 a.m.

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3 P R O C E E D I N G S

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5 THE COURT: Good morning. Please be seated.

6 All right. We are on the record in cause number
7 4:20-cv-957, State of Texas, et al versus Google, LLC. And
8 before we get counsel's introductions, I will note again for
9 the record, as with our last hearing, we do have an
10 audio-only feed right now that is going for the public and
11 the press for this hearing on Google's 1404(a) motion. So I
12 want to make counsel aware of that.

13 And we can have announcements made for counsel for
14 the plaintiffs and for Google. And since we have a list of
15 everyone who's present, if you all just want to confirm that
16 the list we received yesterday is who's appearing, that would
17 be fine.

18 MR. LANIER: Your Honor, Mark Lanier. I will
19 confirm, on behalf of the State of Texas, that the list we
20 sent in is accurate and up to date.

21 THE COURT: Thank you.

22 MR. YETTER: Your Honor, good morning. Paul Yetter
23 for the defendant, Google. And the list we sent to Ms. Wear
24 yesterday is correct.

25 THE COURT: All right. Thank you, counsel.

1 And today we do have Google's 1404(a) motion, and
2 that is going to be our primary purpose today. I think after
3 we have heard counsels' arguments on the 1404(a) motion, we
4 may talk a little bit about the OGP. I did receive the
5 parties' filing yesterday on that issue. And I will also
6 want to get an update on the protective order issue from
7 counsel, but we'll start with the 1404(a) motion.

8 I will remind all of our counsel and everyone who
9 is coming in by video or audio, to please keep yourself on
10 mute unless for whatever reason you're going to be addressing
11 the Court.

12 So from a housekeeping standpoint, two things I
13 want to get out of the way. The first is because we have the
14 audio-only feed for the press and the public, and because we
15 also have folks here in the courtroom, if there is anything
16 that may be confidential or that might be under seal that
17 needs to be discussed, which I don't anticipate, but if it
18 happens, I will visit with counsel -- we can do a bench
19 conference -- and we will need to make arrangements of how to
20 handle that. That's one.

21 Two is just from a standpoint of how your
22 presentations will go. So let me ask counsel for both sides
23 if what I'm about to propose sounds reasonable. My plan
24 would be to have Google begin -- it's Google's motion -- and
25 have about 30 minutes to make its presentation, and I'll have

1 any questions for followup; and then allow the States to
2 respond for 30 minutes; and then allow Google five minutes on
3 rebuttal. And if I have any follow-up questions, we'll
4 complete that portion of the hearing at that time.

5 Is that going to be sufficient time for both sides
6 on this motion?

7 MR. LANIER: Your Honor, it will be for plaintiffs.
8 Mr. Keller will be arguing that for the Court, and I'll do
9 the rest of the discussion of anything else you've got
10 afterwards. But the motion to transfer does seem fine to us.

11 MR. MAHR: Your Honor, Eric Mahr on behalf of
12 Google. That's fine with us, too. I think we can do it
13 under 30 minutes.

14 THE COURT: All right. And I would ask if counsel,
15 when you're doing your presentations and when we're
16 discussing the motion, can use the podium simply because our
17 acoustics are better from the podium and I think everyone is
18 going to want our record to be as clear as possible for this
19 motion.

20 So with that, unless there's any other housekeeping
21 matter, I'll let Mr. Mahr present Google's motion.

22 MR. MAHR: Thank you, Your Honor, and good morning.
23 May it please the Court, my name is Eric Mahr from the firm
24 of Freshfields Bruckhaus Deringer, here on behalf of Google.

25 We appreciate that you're well familiar with the

1 briefing in this case and with the requirements of the 1404
2 standard more broadly, so we appreciate your indulgence in
3 giving us the time to present our thoughts on this.

4 Rather than rehash the briefing and the elements of
5 the test, I really just want to take some time to focus on
6 what we believe the three really most compelling drivers for
7 transfer are in this case. And the first and the single most
8 compelling driver for transfer is the fact that there already
9 have been eight different complaints filed in the Northern
10 District of California, several of which have already now
11 been consolidated, and at least three of which were filed
12 prior to the complaint in this case, months and months
13 before.

14 Those Northern District of California cases present
15 the same core claims arising out of the same alleged conduct
16 concerning the same Google products and services on behalf of
17 the same parties, publishers and advertisers.

18 Having these cases litigated in two different
19 federal courts at the same time really undermines judicial
20 efficiency and poses a very real risk of inconsistent
21 judgments. And duplicative litigation is the most compelling
22 driver for transferring this case because it really
23 transcends the convenience of the parties and witnesses in
24 any particular case. It transcends arguments over whether a
25 flight from Boise or Bismarck is more or less convenient to

1 Plano than it is to San Francisco.

2 Instead, this duplicative litigation consideration
3 goes right to the harm that -- the harm to the efficiency and
4 the effectiveness of the federal judiciary overall, as well
5 as the harm that inconsistent rulings and judgments would
6 pose not just to Google, but to all of the tens, if not
7 hundreds, of thousands of publishers and advertisers who rely
8 on Google's products and services every day.

9 And it's just for these reasons that courts, when
10 evaluating 1404(a) motions in the context in which there are
11 multiple cases involving the same issues, have held that
12 avoiding duplicative litigation takes precedent over the
13 narrower interests in the typical 1404 case where there's
14 only a single case pending.

15 As we cite in our briefs, in the *In re Volkswagen*
16 *of America* case the federal circuit explained that when
17 addressing the 1404(a) motion in the context of multiple
18 lawsuits in different districts, the avoidance of duplicative
19 litigation becomes a, quote, "paramount consideration when
20 determining whether a transfer is in the interests of
21 justice," end quote.

22 Now, while the federal circuit in that case was
23 interpreting Fifth Circuit law, it didn't rely on any
24 circuit's law to come to that conclusion; it relied on a
25 Supreme Court case, the *Continental Grain* case, where the

1 Supreme Court explained, and I'll quote again, "to permit a
2 situation in which two cases involving precisely the same
3 issues are simultaneously pending in different district
4 courts leads to the wastefulness of time, energy and money
5 that § 1404(a) was designed to prevent," end quote.

6 So with that authority, not surprisingly, the
7 district courts across Texas and in this district have
8 embraced this principle when facing the prospect of
9 duplicative litigation.

10 For example, in the *ExpressJet* case, the Southern
11 District of Texas, the Court said that it could not conceive
12 of an arrangement more expensive, time-consuming, or
13 exhaustive of judicial resources than keeping this single
14 suit in Texas while all of the other suits against the
15 defendants are litigated. And in that case, it was the
16 Southern District of New York.

17 Further, while this risk of conflicting judgment is
18 a serious concern in any case, I suggest it's an even more
19 serious concern in this case because the theories of harm
20 that the plaintiffs assert and, maybe more importantly, the
21 remedies that they seek, have a nationwide and really global
22 implication; and again, not just for Google, but for all of
23 the advertisers, publishers, and end users who use and
24 benefit from Google's ad tech products.

25 Plaintiffs' counsel has already declared to the

1 media that their goal in this case is to, quote, "bust up
2 Google," end quote. And even short of measures as radical
3 and as unprecedented as that, any of the structural and
4 injunctive relief plaintiffs are seeking in this case could
5 not be limited to the Plaintiff States' orders, but would
6 affect advertisers, publishers, and end users around the
7 country and around the world.

8 Whether plaintiffs seek to bust up Google or to
9 force it to redesign its products and services to benefit its
10 competitors, or any of the other sweeping relief sought in
11 the complaint, none of it could be limited to the borders of
12 the Plaintiff States. You only have to look at plaintiffs'
13 own complaint to see that.

14 Paragraph 4, both of the original complaint and in
15 the amended complaint, alleges that, quote, nearly every
16 customer -- "nearly every consumer goods company, e-commerce
17 entity, and small business now depends on Google for
18 purchasing display ads in order to market their goods and
19 services to consumers."

20 Now, that might be a bit exaggerated, but it's
21 certainly no exaggeration to say that the rulings in these
22 cases will affect thousands and thousands of consumer goods
23 companies and small businesses far beyond the borders of the
24 Plaintiff States.

25 So, thus, that means the harm that would arise from

1 inconsistent ruling, which is always of paramount concern
2 when there are multiple cases pending, is even greater in a
3 case like this. And that alone, we would submit, is a
4 compelling reason to transfer this case to the Northern
5 District of California.

6 And just to orient the Court, I provided your clerk
7 with two exhibits, handouts, which I've also provided to the
8 plaintiffs; it just lists the cases that are pending around
9 the country concerning these same ad tech issues.

10 THE COURT: Well, one question for you before you
11 move on to the next, as you've put it, driver for transfer.

12 This issue of duplicative litigation, as you know,
13 your friends on the other side have pointed out some
14 differences in this litigation and in pending litigation in
15 the Northern District of California, including some
16 significant procedural differences with regard to the fact
17 that you have class actions that are proposed in those cases.

18 And your colleagues on the other side have also
19 noted that there are other actions pending in other
20 jurisdictions besides the Northern District of California,
21 and at least one of them I believe that has been referenced,
22 the Georgia action, has been pending since 2019.

23 So I'm sure that Mr. Keller will be talking about
24 that, but I would like to hear your response to those
25 arguments which are raised in the briefing.

1 MR. MAHR: Thank you, Your Honor. I appreciate the
2 opportunity.

3 So the class action issue first. In cases of
4 duplicative litigation, the fact that some of the cases might
5 be private cases with classes proposed hasn't dissuaded
6 courts from enjoying the benefits of transfer, the efficiency
7 benefits of transfer, in other cases. The one that easily --
8 most easily comes to mind for me is one I handled in
9 2008-2009, *Cephalon*, it's cited in the briefs, but there, the
10 FTC filed an enforcement action in the District of Columbia,
11 and my client moved to transfer it to the Eastern District of
12 Pennsylvania where a number of class actions were pending.

13 And in that case, the Federal Trade Commission made
14 all of the same arguments: We're seeking different relief;
15 we are -- we're an enforcement agency; and we deserve special
16 deference to our choice of forum; and class certification is
17 going to hold us back. And the district court there held
18 that none of those factors trumped the importance of avoiding
19 inconsistent judgments.

20 And I think there's a number of other cases that
21 are cited in our briefs where, you know, courts are used to
22 managing these kind of issues, and there is certainly enough
23 to do in these cases that both a case without class
24 certification issues can move along in parallel or with a
25 case with class certification issues. But all that will

1 happen more efficiently and fluidly if it's all managed by
2 one judge.

3 The second question you asked was the other
4 actions. And maybe I'll start with the Georgia action inform
5 case. That case is different here both procedurally and
6 substantively, and both those differences kind of explain why
7 we haven't moved to transfer that.

8 First of all, it was filed in January of -- it was
9 in late 2019. And in January of 2020, Google successfully
10 moved to dismiss the claim. So before any of these other ad
11 tech cases came along -- the first one was filed I think in
12 May 2020 -- that case had already been dismissed.

13 The plaintiffs in the inform case in Georgia
14 subsequently amended their complaint, and Google has filed a
15 motion to dismiss that as well and that's pending. But it
16 didn't make a whole lot of sense to seek to transfer a case
17 that had been dismissed and that we expect will be dismissed
18 again on the amended complaint. That's the procedural
19 difference there.

20 The substantive difference there is, unlike all of
21 these other cases we're talking about which are on behalf of
22 publishers and advertisers, that case was on behalf of a
23 competitor. And while there are a lot of allegations in the
24 complaint, both Google and the -- Google argued, and the
25 Court agreed, that the real core complaint that the

1 competitor had was that Google's decision to move from Flash
2 to HTML5, I think it was, disadvantaged the competitor. They
3 wanted Google to stay on Flash. And I don't know the
4 technology that well. I know that these are two technologies
5 that allow use of video and audio in advertisements.

6 And so it was a different question about a
7 competitor arguing that Google's decision to change a
8 particular technology it used disadvantaged it, and it wanted
9 it -- it wanted Google to use the technology that the
10 competitor preferred. Different issue completely than the
11 kind of publisher and advertising issues we see here.

12 As for the other cases, there are three in the
13 District of Columbia and one in the District of West --
14 Southern District of West Virginia. And in those cases, it's
15 just a simple question of this case came up first in terms of
16 our obligation to answer. We were served earlier in this
17 case, and we moved as quickly as we could to file a motion to
18 transfer because it's in Google's interest -- Google wants to
19 move these cases along as much as anybody else. Google is
20 not in the business of litigation, it's in the business of
21 innovation.

22 And so we, as soon as we were served, first thing
23 we did before answering was move to transfer. I think as a
24 practical matter, we think that this case and Your Honor's
25 ruling in here will have an effect on both our strategy, but

1 likely the other courts as well, as to whether they transfer
2 their cases as well. But we just haven't reached a point of
3 having to answer or file our motion to transfer in those
4 cases yet.

5 If Your Honor were to transfer this case as we
6 suggest you should, my expectation is that those other courts
7 will follow suit. If Your Honor were to deny transferring
8 this case, it wouldn't make much sense for us to seek
9 individual transfer of those cases, and perhaps we would be
10 in the situation with the JPML, perhaps not; we haven't
11 crossed that bridge yet.

12 THE COURT: All right. Thank you, counsel. You
13 can move on to, I think you had two more drivers that you
14 wanted to talk about.

15 MR. MAHR: I do, I do. Thank you. The second
16 point I would like to make, and it's a bit related to the
17 first, but the harm that results from having the same claims
18 arising from the same conduct litigated in two different
19 federal courts isn't limited to just this idea of judicial
20 efficiency and the risk of inconsistent judgments; although,
21 that's more than sufficient, as I said, to justify transfer.

22 But redundant litigation really implicates all of
23 the other, many of the other, considerations under 1404, most
24 especially the convenience of third-party witnesses. Keeping
25 this case in the Eastern District of Texas would basically

1 guarantee that the parties, the witnesses, the third parties,
2 and the Court will suffer the very inefficiency burdens and
3 risks that 1404(a) was designed to help courts avoid. And
4 that's because our motion doesn't present the simple question
5 of whether the issues presented in this case should be
6 litigated in the Northern District of California or they
7 should be litigated in the Eastern District of Texas.

8 The issue that our motion presents for Your Honor
9 is whether the issues in this case should be litigated in the
10 district -- in the Northern District of California or in the
11 Northern District of California and in the Eastern District
12 of Texas. Those eight California cases, and Judge Freeman
13 has said she expects more to be filed, they're staying put,
14 there's no motion to move them here or anywhere else.

15 So the witnesses in this case, both Google
16 witnesses, key third-party witnesses, whether from Facebook
17 or from any of the other competitors cited in the complaint
18 that are based in the Northern District of California, they
19 are going to be subject to the litigation burdens in the
20 Northern District of California, no matter what. So the only
21 question is whether they will also be subject to the same
22 burdens here in a case that involves the same core claims and
23 conduct.

24 That being the case, we think it's clear that the
25 litigation burdens of two districts are going to be far, far

1 greater than litigation burdens in a single district.

2 So moving on to my third point, unless Your Honor
3 has questions.

4 THE COURT: I can follow up at the end if I have
5 more.

6 MR. MAHR: Thank you. So my third and final point
7 is that even if we were to ignore the first two points and
8 even if we were to pretend we just had the one case here, and
9 it was the typical case under 1404 where the only
10 consideration is that this single case, is it more
11 conveniently located in the Eastern District of Texas or in
12 the Northern District of California, we submit that still,
13 Your Honor, the clearly more convenient venue in the
14 interests of justice will be the Northern District of
15 California. And that's because none of the factors
16 recognized under the Fifth Circuit's 1404 test point
17 decisively towards the Eastern District of Texas.

18 There is no unique and meaningful connection
19 between this case in the Eastern District of Texas, while at
20 least five point decisively in favor of the Northern District
21 of California. And, as I said, I'm not going to rehash those
22 individual factors because they're well briefed by both sides
23 in the papers, but I did want to focus, for this final point,
24 on what seems to be the main reason that the plaintiffs filed
25 in the Eastern District of Texas, or at least one of the main

1 reasons.

2 The plaintiffs have made no secret of the fact that
3 they filed here because they want to get this case to trial
4 as fast as they can. Of course, the Eastern District has a
5 reputation for being able to move cases fastly -- quickly.
6 But plaintiffs' desire to rush their case to trial is not, in
7 our view, a reasonable basis for denying transfer when
8 there's so many other compelling considerations in favor of
9 transfer.

10 Now, the closest the Fifth Circuit's 1404(a)
11 factors come to recognizing this question of speed is the
12 first public interest factor which is, quote, "the
13 administrative difficulties flowing from court congestion."
14 So three responses or points on that.

15 As a threshold matter, I think it's important to
16 point out that the cases in this circuit have identified this
17 factor, the first public interest factor, as the most
18 speculative of all factors and one that can't alone outweigh
19 other factors. That principle was most notably articulated
20 in the *Genentech* case in 2009, but has since been cited in
21 scores of Eastern District cases involving transfer.

22 The second goes back to this idea of duplicative
23 litigation. Congestion is not served by having the same
24 issues litigated in two courts. This is a big, complex case
25 involving complex issues of market definition and a complex

1 technology. And having two courts work through that alone,
2 that creates congestion, that doesn't solve congestion.

3 And third, and maybe most importantly, plaintiffs'
4 desire to rush this particular case to trial shouldn't be
5 given any weight under 1404(a) because the dangers of rushing
6 a case like this are great, especially where it has the
7 potential to affect so many.

8 Importantly here, I think we've already seen
9 several ill effects of the Plaintiff States rushing this
10 case. For one, this complaint was filed right in the middle
11 of the Plaintiff States' investigation. In fact, the States
12 seem to have abandoned their fact finding and investigating,
13 and just skipped ahead to the suing part this summer, in a
14 way I haven't seen before.

15 Last summer, the States served a massive document
16 demand on Google, and the parties were beginning to negotiate
17 compliance with that demand when the AG's office went quiet.
18 There was no followup on the document demand. And more
19 significantly, there was never any engagement with Google in
20 which Google was given an opportunity to understand what the
21 Plaintiff States' concerns were, to get its view of it,
22 before the litigation was launched.

23 And I recognize the States certainly don't need me
24 to tell them how to run a case, but I've been doing antitrust
25 enforcement for 30 years, including on the prosecution side

1 for the Department of Justice Antitrust Division, and I at
2 least haven't seen a government investigation in which the
3 government did not engage substantively with the subject of
4 the litigation and, instead, just fired off a complaint.

5 And again Plaintiff States can proceed however they
6 choose, that's up to them, but as we had pointed out in this
7 answer, this kind of shoot-first-and-ask-questions-later
8 approach has resulted in plaintiffs' complaint containing a
9 number of factual areas -- errors that still haven't been
10 resolved in the amended complaint. I think, in fact, the
11 fact of the amended complaint is evidence of this rushed
12 filing.

13 It's only been three months into the case. We
14 haven't fired a shot yet, just answered the complaint. And
15 yet, we got an amendment on Monday with 29 new pages, 99 new
16 paragraphs, significantly revising every single section of
17 the complaint, if not every paragraph.

18 And again, I would expect that a case that's the
19 result of kind of sober, deliberative government
20 investigation effort on a -- following an 18-months
21 investigation, would have been able to address some of these
22 issues before it filed, and certainly would have been able to
23 determine which Plaintiff States were onboard or not before
24 filing. But that wasn't the case. So three months into the
25 litigation, we're served with an amended complaint and kind

1 of back at square one.

2 Another consequence, the third consequence, of
3 plaintiffs' rush to file this case in December is the
4 confidentiality breach. And we'll probably get into this
5 with my colleague, Mr. Yetter, when we talk about some of the
6 protective order issues. But I think one thing neither side
7 can contest is that in the course of plaintiffs' rush to file
8 the complaint in December, an unredacted draft of the
9 complaint was passed on to the New York Times and Wall Street
10 Journal where it was reported on by both papers.

11 Now, it's difficult for us not to believe that had
12 plaintiffs not been for whatever reason rushing to file in
13 December, that additional confidentiality measures couldn't
14 have been taken that would have avoided the leak.

15 So in our view, Your Honor, the rush, so far, has
16 got us off to a bit of a poor start, and the idea that that
17 should be a factor in the Court's 1404 analysis, we think, is
18 misplaced. Again, no one's looking to delay this case,
19 especially Google, but neither are we looking to rush it.

20 I'll conclude by saying the Texas Attorney General
21 has stated publicly that he thinks this is the largest
22 antitrust case potentially in the history of the world. And
23 we certainly contest that and we hope to persuade the Court
24 that there's no antitrust case here at all and no case at all
25 here.

1 But just sticking with the transfer issue for
2 today, if this is the largest antitrust case in the history
3 of the world, we see no sense at all in litigating it twice,
4 once in the Northern District of California and another time
5 in the Eastern District of Texas. Thank you, Your Honor.

6 THE COURT: All right, Mr. Mahr. I may have
7 follow-up questions for you, but I'll let Mr. Keller go ahead
8 with his presentation.

9 MR. MAHR: Thank you, Your Honor.

10 MR. KELLER: Good morning, Your Honor. And may it
11 please the Court, Ashley Keller on behalf of Texas. And I'm
12 also proud to say that Mr. Lanier and I now represent North
13 Dakota, South Dakota, and Idaho as well.

14 Can you see me and hear me okay?

15 THE COURT: Yes.

16 MR. KELLER: Very good. As Your Honor is aware,
17 Google is a repeat player in the Eastern District of Texas,
18 and its filed many 1404 motions before. And so I think it's
19 useful to take a step back and just remind the Court of what
20 it has told Google in the past, most recently in *Seven*
21 *Networks* and in *Rockstar*, which is when conducting the 1404
22 analysis, it's important to be specific and not talk in
23 generalities. It's also important not to use carefully
24 parsed language to shade over the *Volkswagen* factors.

25 But, unfortunately, I think Google has ignored that

1 admonition with respect to this motion and, to quote Yogi
2 Berra, *it's kind of déjà vu all over again.* And I think
3 you're going to see that throughout the public and private
4 interest factors as we walk through the analysis.

5 So let me start with the first private interest
6 factor in that regard. As this court, again, said in *Seven*
7 *Networks*, the first private interest factor is focused on
8 documentary and physical evidence, the location of
9 documentary and physical evidence. Google is not supposed to
10 talk about the location of witnesses with respect to this
11 factor; that's double counting, those are factors 2 and 3.
12 But if you look at Google's motion, they're talking about the
13 location of witnesses when they are attempting to identify
14 the location of physical evidence and sources of proof.

15 Furthermore, they don't provide any specificity
16 with respect to the location of physical evidence and sources
17 of proof. They note that they have their headquarters in the
18 Northern District of California, and so it would be some
19 other companies that might be relevant to this case. But
20 headquarters are not physical evidence, they're not
21 documents.

22 So why is Google not being specific? Because they
23 know perfectly well that the overwhelming majority of
24 physical evidence in this case is electronic, and that means
25 it's stored in Google's data centers. Where are those?

1 Google doesn't tell you, but none of them are located in
2 California. The 13 data centers that Google has located
3 throughout the country, zero in California; only two of them
4 are located closer to the Northern District of California;
5 one of them is right here in Texas, 50 miles away.

6 And just this morning, the CEO of Google announced
7 that they're going to spend \$7 billion increasing the size of
8 these data centers. They didn't announce that they're
9 opening any in California, but they're increasing their
10 investment right here in the State of Texas.

11 And so on Google's side of the ledger they've
12 identified no documents or other physical evidence. And if
13 you look behind the curtain, you'll see that most of the
14 physical evidence is going to be located closer to the
15 Eastern District of Texas.

16 Meanwhile, on our side of the equation, we've
17 pointed to ten declarations that identify specific physical
18 evidence that's located closer to the Eastern District of
19 Texas. And we further point out that as a result of the
20 18-month investigation that Your Honor is aware has been
21 ongoing, we now have access to physical documents that are in
22 Austin. Google says, well, that's not relevant because
23 Austin's not in the Eastern District of Texas. But again,
24 that's shading over the actual inquiry under this factor.

25 It's not where the documents are in this Court

1 versus in the Northern District. It's the relative ease of
2 getting the documents to the courthouse that Google's
3 proposing. Where is it easier to get documents from Austin?
4 To the Eastern District or to San Francisco? We all know the
5 answer to that question. And so, to my eyes, the first
6 factor overwhelmingly tilts in favor of the Eastern District
7 of Texas; certainly on the record that Google has created,
8 that is the case.

9 If I could, let me jump to the third private
10 interest factor which in *Seven Networks* and *Volkswagen*, this
11 court and the Fifth Circuit respectively says is the most
12 important, which is the convenience to witnesses. Now, you
13 are supposed to look at all witnesses, party and nonparty.
14 But of course, the convenience to nonparty witnesses weighs
15 the most heavily, and that just makes logical sense.

16 This is a big case. It's important to all of the
17 parties. It's certainly important to the sovereign Plaintiff
18 States and Puerto Rico. It's important to Google; they're
19 going to make their witnesses show up when it serves their
20 interests. It's the nonparty witnesses who are being
21 burdened the most when they have to testify, and so that's
22 why the Fifth Circuit says you give significantly more weight
23 to the nonparty witnesses.

24 But let's start with the party witnesses. Google
25 identifies 151 party witnesses that it says may be called to

1 testify in this case, but they bury the lead; 57 percent of
2 those witnesses are located closer to the Eastern District of
3 Texas and not to the Northern District of California; they're
4 in New York. And so even for Google's witnesses, it's more
5 convenient, it's less costly, for them to come to this
6 district as opposed to going to San Francisco.

7 And, obviously, our group of sovereign states has
8 recently expanded, but the overwhelming majority of plaintiff
9 witnesses are going to be located -- party witnesses are
10 going to be located closer to this courthouse. And,
11 obviously, the State of Texas took an important role in this
12 investigation and in filing this lawsuit, and they're right
13 here at home. Austin is a lot closer to this courthouse than
14 it is to the Northern District of California. So when you
15 talk about the convenience to the party witnesses, less
16 important, it points to this courthouse.

17 What about the nonparty witnesses? Again, Google
18 provides zero in its opening brief, zero specific witnesses
19 that are nonparties that they think need to testify who are
20 located closer to the Northern District of California. Then
21 in reply, if you even choose to consider arguments and
22 evidence first raised on reply, they point to two witnesses
23 from Facebook, one of those witnesses located closer to the
24 Eastern District of Texas. So even the arguments that they
25 raise for the first time in reply don't really point to the

1 Northern District of California.

2 Meanwhile, Texas has identified a baker's dozen of
3 witnesses who are located -- for nonparties, who are located
4 closer to the Eastern District of Texas, and have submitted
5 declarations that they would be willing to testify in this
6 courthouse. So the evidence overwhelmingly points in favor
7 of the Eastern District of Texas.

8 Now, what does Google say in response to that?
9 Google's reply says, well, we're a big company. We do
10 business everywhere. We've got customers all over the place.
11 And so, of course, Texas was able to locate some people who
12 they allege were harmed by our anticompetitive conduct, who
13 would be willing to say they could testify in the Eastern
14 District of Texas. But pay attention to the
15 aggregate statistics, again not specifics, not naming anybody
16 by name, but we've got something like 40,000 customers in
17 California, and there's only 14,000 or so customers in Texas.

18 Respectfully, Your Honor, I think my friends are
19 making a completely inaccurate argument. And I know they're
20 going to agree with me at a future phase of this case, and
21 here's why. We have a lot of respect for this Court's
22 Article III authority and the Supreme Court's admonition that
23 you can only issue relief for the parties who are actually in
24 front of you.

25 I know that Google is going to say, at a later

1 phase of this proceeding when you're fashioning injunctive
2 relief -- assuming we win on the merits, you have to fashion
3 it in a narrow way to provide relief to the actual parties to
4 the case or controversy. For good or for bad, the Attorney
5 General of Texas doesn't speak for the people of California.
6 Texas is here in parens patriae on behalf of its own citizens
7 for harm that occurred in its own state. And the same is
8 true for the other sovereigns. We don't speak for
9 California.

10 And so all of the harm that allegedly occurred for
11 customers in California, who none of the sovereigns here
12 represent, is irrelevant; those aren't relevant witnesses.
13 You would never call somebody and say I've been injured, even
14 though you can't grant me relief, Your Honor, but let me tell
15 you all about what Google's done to me. You would call the
16 actual parties who have been injured who you can fashion
17 relief for.

18 And so the 14,000 customers that are in Texas are
19 absolutely relevant. The 40,000 customers in California,
20 where the attorney general has not chosen to join this
21 lawsuit, they are completely irrelevant. So the third-party
22 witnesses factor, again where we've identified specifically
23 parties who are actually harmed and who this Court can
24 fashion relief for, that's relevant, that gets the most
25 weight in the analysis, and it tilts sharply again in favor

1 of the Eastern District of Texas.

2 So let me toggle from that to the compulsory
3 process problem, which is technically the second private
4 interest factor, but I thought it was more logical and flowed
5 better to address it in this order.

6 Once again, in *Seven Networks*, the Court held, and
7 in *Quest Med Tech* as well, this factor is most relevant for
8 unwilling witnesses. Those who have to be subpoenaed and you
9 have to use compulsory process to bring in front of the
10 court, that that's where this comes into play. Once again,
11 Google has identified zero, not a single specific nonparty to
12 this case, who they say is unwilling to testify but would be
13 within the subpoena power of the Northern District of
14 California. And so on this evidentiary record, it can't
15 point to anybody that supports them on this factor.

16 And again on the other side of the coin, logic
17 simply dictates where you have parties who are injured in
18 Texas, there are going to be some that are within a hundred
19 miles of the Eastern District of Texas. And so to the extent
20 any of them would be unwilling to testify in California but
21 would be willing to testify here, or they would be unwilling
22 to testify here but you could compel them to do so, this
23 factor once again tilts in favor of the Eastern District of
24 Texas.

25 Let me spend a moment on the final factor, Your

1 Honor, which is normally just a catchall category. If the
2 first three factors go our way, I think both sides agree in
3 their papers that this factor goes our way as well; and they
4 would say if all three go their way, this factor goes their
5 way as well. But this is where I want to respond to some of
6 the points that my friend made, because they shoehorned
7 judicial economy into the fourth factor, and there's a lot to
8 unpack here.

9 First, let's talk about the differences between
10 this action and the other actions that are pending in
11 California, which was the thrust of Your Honor's question to
12 my colleague. First, with respect to the class action nature
13 of those cases, the procedural nature of going through a
14 class certification motion, as Your Honor is aware, is highly
15 complex, it's completely irrelevant for the 15 Sovereigns who
16 are in front of you.

17 And I would predict, from a judicial economy
18 perspective, they are still going to be dealing with class
19 certification before this case is tried in front of a jury,
20 based on the statistics but normally obtained, in the Eastern
21 District of Texas. And so throwing the sovereign States, who
22 are not subject to a class action and want to have nothing to
23 do with a class action, into that procedural morass does not
24 improve judicial economy.

25 But there is another procedural point, a threshold

1 procedural point, that I think is extremely important.
2 Google has moved to compel arbitration in the ad tech case in
3 California, and they have every right to say that their
4 contracts with their clients provide an arbitration clause --
5 an arbitration clause, by the way, that requires individual
6 arbitration.

7 And so you heard a lot from my friend about how
8 there is a risk of inconsistency and we don't want to
9 duplicate proceedings. But what has Google done? Like a lot
10 of big companies with arbitration clauses, it has effectively
11 said you must conduct thousands upon thousands of individual
12 arbitrations before individual arbitrators if you want to get
13 relief from us. That's what the contract says and we're
14 sticking by it. The Federal Arbitration Act embodies a
15 strong public policy in favor of arbitration, and we're going
16 to exercise our contractual rights.

17 I don't begrudge them from doing so. It's their
18 contract and they have a right to do it. But when they come
19 before this Court and they say they're so concerned about
20 duplicative proceedings and we can't have the risk of
21 inconsistency, they're inviting precisely that. They want
22 thousands of individual proceedings.

23 I promise Your Honor -- this is a complex case, the
24 issues are important, the law in antitrust is often not
25 crystal clear -- if you impanel thousands of individual

1 arbitrators to decide the merits, they're not all going to go
2 one way or the other. And so with respect, I think given
3 that Google has moved to compel arbitration and is
4 essentially inviting thousands of individual proceedings, the
5 notion that they're all that concerned about inconsistency
6 strikes me as a little bit pretextual.

7 Now let's talk about the Georgia case which again
8 Your Honor specifically asked my friend about. My friend
9 gave a couple of answers that again I find puzzling when it
10 comes to the 1404 analysis. The first answer he gave for why
11 that case wasn't transferred, and Google never made any
12 effort to, is they won a motion to dismiss; and then the
13 plaintiffs did what plaintiffs often do when there is a
14 dismissal without prejudice, they re-file.

15 And so Google is effectively saying, well, we don't
16 care about all that efficiency stuff as long as it seems like
17 we might have a good judge and we might win; when the outcome
18 goes our way, we're fine to not to move to transfer. But
19 that's not relevant to the 1404 analysis.

20 The next thing they said is, well, that case was on
21 behalf of a competitor as opposed to a customer. And I would
22 say, okay, the identity of the plaintiff matters. This case
23 is on behalf of 15 sovereigns, and so that too should counsel
24 in favor of this action being treated differently.

25 We have 15 sovereign entities, 14 states and Puerto

1 Rico, in this case. This isn't just a single action, when
2 you look at my friend's demonstrative that he prepared this
3 morning. And so to my mind, this is the case that has the
4 center of gravity behind it, this is the case that is going
5 to be moving forward that is going to be attracting most of
6 the attention. Everybody else ought to come here if they
7 want to do a JPML, which they reserved their right to do in
8 the future, as opposed to sending things to California.

9 Let me quickly turn to the public interest factors,
10 Your Honor. The first one, I don't think there is actually
11 disagreement between us, which is that this Court moves more
12 efficiently than the Northern District of California. The
13 most that my friends on the other side could say is, well,
14 this factor is the most uncertain, and so don't give it that
15 much weight.

16 But the statistics right now are just
17 overwhelmingly in favor of the Eastern District of Texas.
18 The Northern District is significantly backlogged. I think
19 the average time to trial here would be something like 12 to
20 18 months; it's 44 months in California right now. And we
21 don't have to speculate here. There's been a stay of
22 discovery issued in some of the cases in the Northern
23 District of California, where the trial at the earliest is
24 slated for 2023. And so if this district follows anything
25 remotely approaching its ordinary course, this is going to be

1 an even more efficient forum, and so this factor clearly
2 tilts sharply in favor of the Eastern District of Texas.

3 And then the final point I'll just cover on the
4 local interests, Your Honor. We're here with the State of
5 Texas as a sovereign entity, obviously, as a plaintiff. Of
6 course, when exercising its parens patriae authority on
7 behalf of customers who have been harmed by Google's
8 anticompetitive conduct, there is a strong local interest.

9 This is not just, you know, the jury being asked to
10 be impaneled, which is what the Fifth Circuit is concerned
11 about, for something that has nothing to do with the
12 locality. There are people in the Eastern District of Texas,
13 businesses within the Eastern District of Texas, who have
14 been meaningfully harmed by the conduct that we allege in the
15 complaint. And so the notion that this factor goes against
16 us because Google is headquartered in California, I'm not
17 sure that it passes the straight-face test.

18 Let me just conclude with something that I'm not
19 sure was really one of the public or private interest
20 factors, but it goes to some of the comments that my friend
21 made at the end. I take exception, and I'll use a kind word,
22 to the notion that this has been rushed and that we jammed
23 through our complaint and that it was riddled with factual
24 errors, and we're already off on the wrong foot here.

25 We take our obligations to this Court, as officers

1 of the court, extremely seriously. The public officials who
2 are involved in this case similarly take their obligations to
3 their own citizens extremely seriously. This would not be
4 the first time in U.S. litigation history where a defendant
5 said that a complaint wasn't accurate factually. That's why
6 they get to answer, and we have discovery, and we have a
7 civil justice system where the facts get sorted out. But it
8 shouldn't come as a surprise to anybody that we have
9 different perspectives on that.

10 But the idea that we're jamming through documents
11 to this Court and rushing the process is incorrect. We are
12 in a hurry, though. We do want this case to go to trial.
13 And we agree, of course, with Attorney General Paxton and
14 others that this is a meaningful antitrust case.

15 The reason that we're in a hurry is because Google
16 is so large and has its tentacles spread throughout the
17 entire U.S. economy in such a pervasive way that the harm
18 that they are doing, based on the facts we allege, occurs
19 every nanosecond of every day. So, yes, we want to get
20 redress expeditiously and, guilty as charged, that is part of
21 the reason that we proudly chose the Eastern District of
22 Texas. We don't apologize for that for one second.

23 But there is a huge difference between plaintiffs
24 wanting to get access to justice expeditiously and sloppy
25 tactics which we were accused of, and we frankly resent the

1 implication. I'll close there, Your Honor.

2 THE COURT: You know, Mr. Keller, before I have
3 Mr. Mahr give his rebuttal, I did want you to respond a bit
4 further to the point that he made regarding duplicative
5 litigation. You've talked about it a bit. I note that
6 Mr. Mahr referenced some of the language in case law talking
7 about duplicative litigation being a paramount consideration.

8 And I'm curious, your response, on how that
9 consideration plays against all of the public and private
10 interests factors. I've heard and understand your argument
11 regarding just how duplicative the litigation is, let me put
12 it that way, in terms of issues, in terms of parties, but I'm
13 interested in your take on the case law with regard to that
14 being of paramount consideration, how does that compare if
15 you are looking at all the other factors also?

16 MR. KELLER: Sure.

17 THE COURT: If the other factors were pointing
18 against transfer or the other factors did not establish that
19 it was clearly more convenient to move something, would that
20 consider -- could that consideration nonetheless trump those,
21 the typical private and public interest factors?

22 MR. KELLER: I'll do the best I can to answer your
23 question, Your Honor. But as you are familiar, this is
24 clearly operating in the realm of standards as opposed to
25 bright-line rules. Courts have said repeatedly the factors,

1 no one of which is dispositive, they're not even exhaustive;
2 you can consider other things; the facts and circumstances of
3 any particular situation can be different. And so with that
4 as the rubric, it's sometimes difficult to sort of say, well,
5 aha, this one factor can trump everything else.

6 I certainly don't think, on the facts and
7 circumstances of this situation, the judicial economy
8 argument that my friend made, even if you took it on its own
9 terms, would trump all of the other factors that we say go
10 our way based on this evidentiary record. But as you heard
11 me say before, and I'm happy to expound if I didn't provide a
12 sufficient answer, we don't think that there's going to be a
13 great deal of judicial economy considerations that would be
14 paramount in this case, just given the procedural
15 differences.

16 And I do agree with my friend. The cases don't
17 have to be identical before you take into account judicial
18 economy, but class actions are a different beast.
19 Arbitrations are certainly a different animal than what we're
20 pursuing here.

21 And one final point that I think is worth noting.
22 A lot of the reason the cases in the Northern District of
23 California are pending there is because again Google, well
24 within its contractual rights, has put in a forum selection
25 clause, and so plaintiffs there had no choice but to sue in

1 Google's backyard. The sovereign States and Puerto Rico here
2 should not be held to the contract that Google hoists upon
3 its customers when, of course, Google has no right to do that
4 to sovereign entities.

5 THE COURT: All right. Thank you, Mr. Keller. And
6 finally -- I'm going to ask Mr. Mahr the same question along
7 these same lines -- recognizing that these factors are all
8 looked at together in the analysis of 1404(a), are you aware
9 of any cases where you've seen a court say notwithstanding
10 the fact that if we took the other factors together, it would
11 indicate one thing, but this paramount consideration of
12 duplicative litigation leads us in another direction; in
13 other words, a court that said even looking at all the
14 factors together, this particular consideration is so
15 significant that even though the other factors cut against
16 it, we think the result should be transfer?

17 MR. KELLER: A one-word answer: No.

18 THE COURT: All right. Thank you.

19 MR. KELLER: Thank you, Your Honor.

20 THE COURT: Mr. Mahr, you can -- I have a couple of
21 questions for you, and I'll let you do your rebuttal, as
22 well.

23 So my first question is, just to get your answer to
24 the last question I asked Mr. Keller, you have emphasized,
25 and it seems to me that Google's argument depends very

1 heavily, on the duplicative litigation argument. And so I am
2 curious if you have any case law where that factor, in the
3 context of a court's consideration of all the factors, the
4 private and public interest factors, has weighed in a
5 dispositive manner, notwithstanding the fact that maybe the
6 other factors would not have supported transfer.

7 MR. MAHR: Well, I think in -- one is the *Cephalon*
8 case I mentioned. You know, I don't know a case where every
9 single factor went against it and the judge said forget it,
10 it doesn't matter, paramount consideration. But I would say
11 that the Supreme Court's language, the -- in the language of
12 the courts that have addressed this issue, have -- calling it
13 paramount is an indication that it outweighs those other
14 factors. But certainly *Cephalon*, there were another -- a
15 number of factors.

16 THE COURT: Well, the reason -- part of the reason
17 I raise that is that as your friend on the other side,
18 Mr. Keller, was mentioning, one of the other factors -- and
19 this has to do with convenience of witnesses -- you will see
20 any number of court opinions that talk about as the most
21 important factor that a court will look at is convenience of
22 witnesses. So we have courts using language to convey the
23 importance of certain factors.

24 The factor that you are relying on, the duplicative
25 one, falls under that -- generally speaking, falls under the

1 all-other-practical-problems factor, at least in the cases
2 that I see, and in this district it's often referenced
3 immediately under that factor, the possibility of duplicative
4 litigation.

5 And so part of the reason I ask you this question
6 is because you do have language with regard to at least one
7 of the other factors the Court is looking at, and that has to
8 do with the convenience of witnesses that say that is the
9 most important thing the court is looking at, and then you
10 also have your language with regard to duplicative
11 litigation.

12 So I think you've answered my question, but I did
13 want to see if you had a case where this duplicative
14 litigation issue was so significant that it trumped other
15 factors.

16 MR. MAHR: Well, *ExpressJet* is an interesting case
17 for that purpose. *Cephalon* is an interesting case, as I was
18 saying. And in the D.C. Circuit test -- case -- test under
19 1404, unlike here, the plaintiffs' choice of venue is given
20 substantial deference, and yet it was overruled in favor of
21 paramount -- the paramount consideration of the duplicative
22 litigation.

23 But here's why that issue doesn't I think come out
24 as in sharp relief as you're asking. It's because when you
25 have duplicative litigation, by definition those other

1 factors are going to go towards the transfer of district,
2 also. I agree many of the cases say convenience of the
3 witnesses is also the most important factor, at least of the
4 eight. But when you have duplicative litigation, if you're
5 talking about a witness who is actually material to a case,
6 having two cases is never going to serve the convenience of
7 the witness because they're going to have to testify in two
8 cases.

9 So say you're talking about one of the competitors
10 here, or a truly material meaningful witnesses in this case.
11 If there are two cases going on and that witness is truly a
12 unique and meaningful witness in the case, they're going to
13 have to testify in two.

14 So I don't think it will be that often where you'll
15 see, well, duplicative litigation stands alone, but it would
16 be more convenient to the witnesses for it to be litigated in
17 two jurisdictions at once, or it would be better in terms of
18 court congestion to have two courts wrestling with these
19 issues at once. So you don't get that everything going one
20 way, and duplicative litigation going the other way.

21 THE COURT: Well, and that, your answer, may be a
22 good segue to the second question I have for you, which is
23 admittedly a broad question, but it's raised by Mr. Keller's
24 presentation and I did notice it in the briefing, which is
25 the 1404(a) analysis is an analysis that needs to drill down

1 on these issues. It needs to drill down, for example, with
2 regard to the compulsory process factor, to name one, of what
3 witnesses have you identified that are nonparty witnesses
4 that are unwilling witnesses. I'm not aware of any that
5 Google has pointed out.

6 It needs to drill down on who the nonparty
7 witnesses are who it would be not convenient to testify here
8 in the Eastern District as opposed to the Northern District
9 of California. As your friend on the other side pointed out,
10 I don't recall seeing any in the original motion and I only
11 recall seeing a couple in the reply, one of whom it didn't
12 necessarily appear it would be more convenient to appear in
13 the Northern District of California.

14 And I won't go into all the other specifics, but I
15 do -- I feel like Google's filings have a lot of broad
16 statements, for example, about documents and access to
17 sources of proof, and broad statements about witnesses, but
18 not a lot of drilling down in detail and support in the way
19 that the plaintiffs have. And that's why I say I feel like
20 you've relied very strongly on the duplicative litigation
21 issue.

22 Your friend on the other side has pointed that out
23 in his presentation, and so I would like to get your response
24 on those issues and where that proof is that, as you put it,
25 there are five factors that work in favor of transfer.

1 MR. MAHR: Certainly. And so I'll focus on
2 witnesses, and maybe start with the Fifth Circuit's --
3 another *Volkswagen* case, this is the 2008 *Volkswagen* case by
4 the Fifth Circuit. Footnote 12 of that case, they made clear
5 that there is no kind of blanket rule requiring affidavits
6 and specific people. And I think that's particularly
7 appropriate in a case like this where you have this massive
8 complaint; we're moving the beginning of this litigation; and
9 the idea that, for example, we can go out and get affidavits
10 from unwilling witnesses, unwilling witnesses are not great
11 candidates for getting affidavits from to support a venue
12 motion. But I think more importantly, at this stage of
13 litigation, there are enough indications of where the
14 witnesses are, and it's also clear that there are none here
15 that would suffice in this kind of case, and I'll explain
16 why.

17 The witnesses -- and to do this, I would like to
18 contrast the witnesses identified by the plaintiffs versus
19 the witnesses identified by Google. After an 18-month
20 investigation and collecting 3,000,000 documents, and
21 interviewing 64 third-party witnesses, the plaintiffs were
22 not able to show that one of those witnesses, not one of
23 those witnesses, of the 64 is located in the Eastern District
24 of Texas. Now, they argue, oh, about half are closer to the
25 Northern District of California, many of them in the Northern

1 District of California, and half are closer to Texas, but
2 that's closer. We have witnesses that they interviewed in
3 the Northern District of California, and none in the Eastern
4 District of Texas.

5 Mr. Keller referred to the baker's dozen of
6 affidavits. These are affidavits handpicked for this motion.
7 And even out of the 13 affidavits created for this motion,
8 only 4 of them are even in the State of Texas; and again, not
9 one of them is mentioned in the complaint; the other 9 are
10 spread around the world, including in France and in the UK.

11 And there's a number of cases, *Fujitsu, Genentech*
12 and *Rizvi -- SEC v. Rizvi*, that says once you're traveling a
13 significant distance, the additional hour or two from --
14 between one plane flight and another isn't material compared,
15 when weighed, against witnesses that are in one of the two
16 districts.

17 And, third, with respect to these 79 companies who
18 the plaintiffs say they think may be Google customers, only
19 one of which is named in the complaint, none of them are
20 unique. And that was our point about the fact that there are
21 a 198 publishers based in the Northern District of
22 California, and just 6 in the Eastern District of Texas.
23 There are 40,000 advertisers based -- these are Google
24 customers -- based in the Northern District of California,
25 and a third of that in Texas. They're using broad numbers

1 and we're using broad numbers, but it's not -- it's to show
2 where the weight of the evidence is in the case.

3 But so out of all of the different ways the
4 plaintiffs have come up with to support the jurisdiction in
5 terms of witnesses, they still haven't come up with one who
6 is actually material to the investigation, who is identified
7 in the complaint, and who is in the Eastern District of
8 Texas.

9 Now, what did we do? Again, I don't think we were
10 in a position to be able to go around and get affidavits from
11 our competitors and any of the, again, tens, if not hundreds,
12 of thousands of publishers and advertisers. That's going to
13 take a lot of funneling in the course of discovery to find
14 which ones are material. But what we did do is use the
15 plaintiffs' complaint, and that's where we based our
16 identification of witnesses on; we didn't make it up.

17 We didn't make up 151 current or former Google
18 employees. Those are documents -- those are Google employees
19 whose documents were identified in the complaint plaintiffs
20 filed. Of those 151, 67 are in New York, 60 were in
21 California, 16 were in other countries or other states, and
22 not one was even in the State of Texas, much less the Eastern
23 District of Texas.

24 And then there are 9 current or former Google
25 employees identified in the complaint, 7 in New York, 2 in

1 California, not one in the State of Texas, not -- in
2 particular, the Eastern District of Texas.

3 We looked at the 13 competitors who are referenced
4 in the complaint who are likely to be critical third-party
5 witnesses in an antitrust case. Again, none of them are in
6 the Eastern District of Texas, and all of them have offices
7 in the Northern District of California.

8 And finally, we looked at the 10 current or former
9 Google employees whose depositions the Office of Attorney
10 General of Texas attended; 6 were in California, 3 in New
11 York, 1 in Colorado, and not one in Texas or in the Eastern
12 District of Texas.

13 So our point is that there is not a single witness,
14 material witness, that they've identified with a unique
15 connection to this case in the Eastern District of Texas, and
16 there are a plethora of them in the Northern District of
17 California.

18 THE COURT: How do you respond to Mr. Keller's
19 argument that, you just noted it yourself, of the I guess
20 it's party witnesses that you identify that a large number of
21 which are in New York? This is a case that you, yourself,
22 today have said is a national and, arguably, international
23 reach. In a case like that and given the number of party
24 witnesses that you have that are even party witnesses that
25 are not in the Northern District but are elsewhere in the

1 United States, how does that play out for your motion?

2 MR. MAHR: Well, I would go back to the -- those
3 cases, the trio of cases -- and there are many more, I just
4 picked three -- *Rizvi*, *Fujitsu*, and *Genentech*. *Rizvi*, in
5 particular, this Court, the Eastern District of Texas, said
6 they don't see a material difference flying -- I think in
7 that case it was from Philadelphia or Washington to the
8 Eastern District of Texas versus the Northern District of
9 California; and that that distance, I don't think that's a
10 material consideration, especially again when weighed against
11 the existence of witnesses who are in one of the two
12 candidate jurisdictions.

13 THE COURT: All right. And your response -- I
14 would like to hear your response regarding the duplicative
15 litigation issue that you raised, and that Mr. Keller noted,
16 you have the arbitration provision being enforced. You've
17 talked about the class action issue. You and I didn't talk
18 about the arbitration issue that was raised, and that in and
19 of itself would generate potentially a lot of different
20 results, according to what your colleague has said. And
21 what's your response to that?

22 MR. MAHR: Well, first of all, there's a factual
23 element to it that only two out of twelve class
24 representatives in the California cases are arbitrating in
25 the case. And so it is not going to be that every class

1 representative -- and I don't know the details of who signed
2 what or how, who it's enforceable against and who it's not
3 enforceable against, but the fact is there are only two out
4 of twelve, and that's just the class representatives. So
5 it's not a case where this case is going to go to the
6 Northern District of California, and then all of the class
7 actions are going to disappear because everyone's going to be
8 going into thousands and thousands of arbitrations. That's
9 just not the case. There's two.

10 But second, I'm not sure that the defenses that
11 might be lodged in the eventual case are a proper basis to
12 make a determination as to whether those defenses are
13 based -- handled by a single judge or by two judges at the
14 same time. But again, I think the real fact is that it's
15 just two out of ten at this point.

16 THE COURT: All right. The last item I wanted to
17 ask you about, before I let you make any other remarks on
18 this, are two items with regard to the standard that
19 courts go on to apply the motion. The first is that, I take
20 it, you would agree that the burden here is on the movant to
21 show under this analysis that it is clearly more convenient
22 to be in the Northern District of California; in other words,
23 not that it may just be just as convenient to go to the
24 Northern District of California, but that it is clearly more
25 convenient to be in the Northern District of California.

1 Would you agree with that, Mr. Mahr?

2 MR. MAHR: We agree with that and we embrace that
3 both, whether you're looking again at the individual criteria
4 or this paramount issue. I just would note, if I may, Your
5 Honor, clearly -- you could say clearly or you could say
6 clearly, and the emphasis -- it's important to note that the
7 outer bound of it is the forum non conveniens where it's
8 substantially more convenient, and 1404 is specifically
9 designed by the legislature to have a, the courts found, to
10 have a standard below that.

11 THE COURT: I'm aware of that.

12 MR. MAHR: Okay.

13 THE COURT: Yes.

14 The other is that when deciding this motion, the
15 Court can consider undisputed facts outside of the pleadings,
16 such as affidavits and declarations, but it must draw all
17 reasonable inferences and resolve factual conflicts in favor
18 of the nonmoving party. Would you agree with that?

19 MR. MAHR: Yes, Your Honor.

20 THE COURT: All right. Any other rebuttal that you
21 would like to make? I've kind of peppered you with a few
22 questions here.

23 MR. MAHR: No, I appreciate your questions.

24 Just three points. First, my friend represented --
25 referenced the Google cases as if we've been told this

1 before. These motions aren't decided on the identity of the
2 party. But it's interesting, if you look at the cases that
3 Google has tried to transfer previously -- because sometimes
4 they've been transferred and sometimes they have not -- the
5 cases that have not been transferred, some of which were
6 mentioned by Mr. Keller, *Seven Networks*, the Court in that
7 case, in addition to looking at the other factors, said that
8 it had already spent significant resources keeping the case
9 on track in this district and coordinating with a similar
10 pending case in the Northern District of Texas. So there you
11 have the consideration of having the same -- the same cases
12 in the same -- at least the same state in that case.

13 In the *Smartflash v. Google* case, same thing, there
14 was a significant factual overlap between that case, the
15 Court found, and another case within the same district, the
16 Eastern District of Texas.

17 *Content Guard*, same thing, the instant case and the
18 co-pending Amazon action before this case, the courts
19 substantially overlap.

20 And then *Rockstar Consortium* was also mentioned.
21 *Rockstar* is based in Plano, Texas. There was -- there was an
22 obviously material witness with a unique and meaningful
23 connection to this district; something that's absent here.

24 So Google did learn from those cases, and it's that
25 when there are efficiencies that come from having cases that

1 are similar in the same jurisdiction, that jurisdiction is
2 the preferred venue.

3 THE COURT: Well, let's talk about *Seven Networks*
4 for a moment because that came up in your colleague's
5 discussion, and one of that is the items that the district
6 court discussed in *Seven Networks* was on access to sources of
7 proof. And it seems that there were maybe a similar,
8 arguably a similar, disconnect in that case, and it seemed in
9 that case that Google generally referred to where its
10 headquarters was in terms of where its sources of proof were.

11 But the district court, along the lines of what's
12 been alleged by your friends on the other side, said, well,
13 there is actually, where these materials are stored are
14 actually in -- it was a lesser number of centers across the
15 country than what are identified in this case. Yet, your
16 colleagues on the other side have identified 13 data storage
17 centers across the country, and you heard your colleague's
18 argument on that. And from what I've seen on Google's
19 filings, again I haven't seen anything specific in your
20 filings to contradict that.

21 MR. MAHR: Well, there are 13 data centers across
22 the country, and there's one in Texas, there is also one in
23 Nevada and one in Oregon. But, I mean, I think this is an
24 interesting factor, the first private interest factor,
25 because now that we're -- everything is digitized, on the one

1 hand, all of this is accessible anywhere. On the other hand,
2 courts have made clear this is still a relevant factor.

3 But the fact that a particular 1 out of 13 data
4 centers happens to be here doesn't tell us anything about
5 what data is stored at that center, and I couldn't begin to
6 tell you. And data centers are not a place where there are
7 employees sitting there and you knock on the door and say *I*
8 *would like some data. Can you please put it in the back of*
9 *the car and I'll drive it to the courthouse.*

10 So I don't think data centers which are generally
11 stated -- generally located in places where real estate is
12 available at a lower cost than say in the middle of Dallas or
13 the middle of San Francisco, and so I'm not sure that they --
14 I guess I would disagree with the court in *Seven Networks*
15 that that was -- should have been such an emphasis.

16 THE COURT: All right. Well, I think this is an
17 area where I think specificity helps because I think the test
18 is where data is stored. But there's a reason why a party
19 thinks that shouldn't be meaningful, then I need an
20 explanation as to why it isn't meaningful. I think just a
21 general reference to where your headquarters is, standing
22 alone and in the context of having data being stored in other
23 locations, you would need more explanation as to why that's
24 not significant or that shouldn't be considered significant.

25 But let me ask you a different question which has

1 to do with your -- the point you just made about some of
2 these cases involved a local -- you know, local businesses in
3 Plano or elsewhere in the district. We do have the State of
4 Texas as a plaintiff in this case, and the State of Texas is
5 here a cross sovereign, but it also has asserted it's here in
6 a parens patriae capacity. And so that suggests that the
7 State is representing the interests of individuals and
8 businesses across the state, including in this district. And
9 this state as a plaintiff, in any case, presents a different
10 kind of plaintiff. I'm curious what your, you know, how your
11 response regarding plaintiffs in the district or representing
12 interests in the district plays out, given that you have the
13 State here both as a sovereign and a parens patriae role.

14 MR. MAHR: Yes, Your Honor. And we certainly
15 respect the sovereignty of the State and recognize its
16 interest in its citizens. Here, I think in this question of
17 weighing that in the 1404(a) analysis, you have to consider
18 that as kind of one-tenth of what it would normally be on the
19 regular complaint; and now in the amended complaint,
20 one-fifteenth. There's just one of many sovereigns in this
21 case and they each have those same interests, and not all of
22 them are in Texas, obviously, just one-fifteenth of them.

23 THE COURT: Have you seen cases where the fact that
24 there is more than one sovereign in a case undercut that
25 plaintiff's -- the fact that a lead plaintiff had chosen a

1 particular forum?

2 MR. MAHR: I haven't seen that, but I've also --

3 THE COURT: I can tell you I've seen a case where
4 it didn't, out of the Northern District of California. I
5 don't know if you're familiar with the case of *California v.*
6 *United States Bureau of Land Management*, it's at 2017 Westlaw
7 8294171. In that case, you had the State of California, the
8 State of New Mexico, and a group of environmental
9 organizations that had filed a lawsuit, and there was a
10 1404(a) motion. And the Court, in that case -- now, this is
11 in the context of talking about deference to the plaintiff's
12 choice of forum.

13 And the Northern District of California in that
14 case said there's some substantial deference, may be even
15 more, given that you have the sovereign State of California
16 in that case. And as far as I can recall, I don't see a word
17 about the State of New Mexico and the fact that the State of
18 New Mexico in that case would undercut somehow that choice.

19 And so I'm wondering if you have other cases where
20 the fact that there is more than one sovereign would undercut
21 the fact that a lead state or that at least one of the states
22 in a case plainly has an interest in the subject matter.

23 MR. MAHR: I don't have a case that says that, Your
24 Honor. But I would suggest that different tests in different
25 jurisdictions have different ways of treating the choice of

1 the plaintiff in terms of venue, period, as well as the
2 plaintiff's choice of venue when the plaintiff is a
3 government enforcement agency. And as I was mentioning, the
4 *Cephalon* case earlier. In the D.C. Circuit's case, it's
5 given substantial deference -- I think they even use the word
6 "paramount" -- in that district, the plaintiff's choice of
7 forum, and that's because that's what that particular test
8 is.

9 And as we know in the Fifth Circuit, there is no
10 deference given to the plaintiff's choice of forum whether a
11 government entity or not, but that is baked into the test,
12 that's where we get to clearly demonstrate, and the Fifth
13 Circuit has said that's where the respect for the choice
14 goes.

15 THE COURT: Well, I suppose that case just makes me
16 wonder whether it should get less deference in this
17 context -- do you see what I'm saying -- that you have at
18 least one state that clearly has an interest, but I think
19 you've suggested in your briefing and here today that it
20 should get less, that should have less importance, because
21 there are other sovereigns. And I'm not sure that that's
22 accurate.

23 MR. MAHR: Well, I think -- and I don't have a case
24 for you, but I wouldn't say that the deference comes out in
25 the case whichever way you would decide that issue. If you

1 would decide the issue that full deference goes to Texas,
2 it's still a clearly demonstrate test. And if it was only
3 one-fifteenth, it would still be the clearly demonstrate
4 because the Fifth Circuit says that that deference to the
5 choice is reflected in the test.

6 THE COURT: All right. Thank you.

7 MR. MAHR: Do I have time for one more?

8 THE COURT: Yes, you can.

9 MR. MAHR: I did want to address the question of
10 similar issues because maybe we haven't put enough stress on
11 that, but the Supreme Court even says the identical issues,
12 the *Continental Grain* case from 1960. And that has been
13 relaxed a bit by other courts who have said the same or
14 similar issues in the last 60 years. But we're comfortable
15 with the identical issues because there are many identical
16 issues that will have to be resolved in this case that will
17 also have to be resolved in the Northern District of
18 California case; they include, at the outset, market
19 definition.

20 There are multiple markets in this case. And
21 markets in this case are dynamic and evolving; they're
22 different today than they were ten years ago, and they'll be
23 different tomorrow than they are today. That makes -- not
24 that -- you obviously can handle that and so can Judge
25 Freeman, but having two judges do that at the same time I

1 think is a real -- a problem. Also, some of these markets
2 involve two-sided transaction platforms which requires a
3 somewhat different analysis.

4 Under the Supreme Court's case in *Ohio v. American*
5 *Express*, relatively new case and not that many courts have
6 dealt with it yet, having two do it at the same time under
7 the same facts for the same markets, I think also presents
8 really big issues.

9 Once the markets are defined and properly
10 understood as antitrust markets, the question is does Google
11 have monopoly power; that's an identical issue in both cases.
12 Monopoly, as we know, is not illegal. Justice Scalia
13 explains that in depth in *Verizon v. Trinko*. So it has to be
14 conduct, it's the conduct -- is there anticompetitive conduct
15 as opposed to just vigorous competition, on the merits, that
16 will have to be decided in both cases.

17 And as you can see in plaintiffs' complaint, there
18 is a lot of conduct alleged there, and that conduct will have
19 to be evaluated by this Court and the other court, if you
20 choose to keep the case, both for the antitrust claims, but
21 also for any of the state law claims where it's the same
22 conduct, whether the vehicle it's challenging is a state law
23 statute or antitrust laws.

24 And so all of these I think -- that's just a few of
25 them, that's just getting through the earliest part of the

1 case, but there are many identical issues, and we think for
2 that reason that Your Honor should transfer this case.

3 THE COURT: All right. The last question for you.
4 Can you remind me of the cases that you said you thought were
5 the most on point with regard to transfers that involve going
6 into another pending action where there were class
7 allegations and class certification issues? Was that the
8 *Cephalon* case you referenced?

9 MR. MAHR: *Cephalon* is one of them. There are a
10 host of enforcement actions, the *FTC v. Watson*
11 *Pharmaceuticals*, which is 611 F.Supp.2d 1081, *SEC v. Captain*
12 *Crab*, 655 F. Supp. 615 -- there are some others, I don't want
13 to list them all here, I think they're in our brief -- but
14 these are cases where there were enforcement actions that
15 were transferred under 1404(a) into jurisdictions where there
16 were -- where there were already pending class actions.

17 THE COURT: Right. The similar litigation was
18 litigation that involved class certification issues.

19 MR. MAHR: I know that for a fact in the first two
20 I mentioned, and that's why I didn't want to read all the ten
21 because I'm not sure in every one.

22 THE COURT: All right. Thank you, Mr. Mahr.

23 MR. MAHR: Thank you.

24 THE COURT: Well, I spent more time with Mr. Mahr
25 than I thought I might.

1 Oh, one moment. I'll wait.

2 (Pause in the proceedings.)

3 THE COURT: All right, Mr. Keller, if you -- if you
4 would like to make any additional remarks, I'll give you a
5 few minutes because I spent more time with Mr. Mahr than I
6 thought I would.

7 MR. KELLER: I don't need any more time, Your
8 Honor. If you have questions, I'm pleased to go back to the
9 podium. But otherwise, I'm happy to rest.

10 THE COURT: No. I think I've had all my questions
11 answered. Thank you.

12 Thank you to both counsel. The presentations have
13 been very helpful.

14 MR. KELLER: Thank you, Your Honor.

15 THE COURT: So I think before we break today, I had
16 a couple of other issues that it made sense to discuss
17 briefly. So the first is the where you stand on the
18 protective order. You will recall that when we met the last
19 time for our conference, the aspiration was that we would
20 have a protective order in place before an OGP went out. And
21 I understand the parties have been working on the protective
22 order, but maybe you can tell me where that process is right
23 now.

24 MR. YETTER: I'm happy to give it a try.

25 MR. LANIER: As am I. We'll both give it a try,

1 Your Honor.

2 THE COURT: All right. Mr. Yetter, you're at the
3 podium. You can start.

4 MR. YETTER: All right, Your Honor. When we were
5 last together on February the 4th, as the Court will recall,
6 we had already been discussing the protective order for some
7 time. There was two issues that had come up, and those were
8 issues that are Google had raised that we believe are
9 important additional protections to the template that they
10 have we've already agreed on. The parties have agreed on the
11 protective order largely, the protective order that was
12 entered in the Search case in D.C.

13 And the two additional protections that we were
14 asking for that we had raised and we were in the midst of
15 discussing were additional disclosures. And the disclosures
16 were as to out -- third parties, essentially agents,
17 consultants, and experts of either side, that would have
18 access to confidential information of the producing party or
19 a third party, first just their identities, and second -- and
20 that would be reciprocal; and, second, what Google was
21 proposing was that the experts and consultants for the
22 Plaintiff States would also disclose their affiliations with
23 competitors or complainants of Google.

24 And as we told the Court we would, we have had many
25 discussions about this. We have not been able to reach

1 agreement. So those two issues are outstanding. I can go
2 into them if you would like. I can go into each one of them
3 briefly.

4 There is now a third issue, however, and I'll let
5 counsel take that up, which the Plaintiff States after the
6 last hearing have now asked us about, proposed to us, which
7 we do not agree with. And essentially the Plaintiff States
8 have asked for a provision in the protective order that we
9 believe essentially is a do-not-break-the-law provision that
10 isn't appropriate for a protective order that doesn't have
11 any basis for it and that we think is unwarranted.

12 But if the Court would permit it, I can briefly go
13 into the two issues and our position on those two issues, and
14 then counsel will certainly give the plaintiffs' position.

15 So the two issues we have, we think, as the Court
16 commented at the last hearing, the disclosures to -- right
17 after this lawsuit was filed -- to the national media,
18 counsel for a robust -- in fact, I think in the Court's
19 words, a quite robust protective order here. And so what we
20 have is an additional provision that we think would be
21 preventive, that would discourage recipients of confidential
22 information from thinking about, for whatever reasons they
23 may have, breaching the terms of the protective order.

24 The significance of that, especially in a situation
25 like this, is there is going to be a tremendous amount of

1 highly confidential information exchanged between the
2 parties, and it's not just going to be Google, so there will
3 be third parties. This is an antitrust case, and competitive
4 information will be exchanged that needs to be -- that will
5 be produced voluntarily in some situations, involuntarily in
6 others, that needs to be produced with the utmost care and
7 with the certainty that there will not be further
8 disclosures. This is not about what happened in December, as
9 much as what's going to happen over the next 12 to 24 or
10 36 months.

11 And this provision of identifying the recipients
12 before they get confidential information is hardly a new one,
13 as we -- I believe the Court may recall, at the last hearing,
14 I explained that what we were proposing was a template
15 provision in the Western District. Every case, every civil
16 case, patent or otherwise, has a provision that says before
17 you give your outside experts and consultants highly
18 confidential information from the other side, you have to
19 identify that person to the other side.

20 And every one of these -- and that Western District
21 provision, and every other type of protective order that has
22 this, does it for a reason. It's because the producing party
23 is in the best position to raise a concern, an objection,
24 ahead of time before the recipient, before that outside
25 consultant or expert, receives this confidential information,

1 so that extra steps could be taken. It could be nothing more
2 than simply making sure that that expert or consultant has no
3 question about the strictures of the confidentiality, or even
4 maybe have -- potentially has to have additional
5 confidentiality commitments made.

6 But the reason why that disclosure to the
7 adversary, to the producing party, is made is because that
8 party is in the best position to know where there's going to
9 be concerns. It's not just the Western District, as the
10 Court may have seen this morning. And I know the Court is
11 very diligent about reading your filings. I don't know how
12 you could have read it this morning, but we actually filed
13 something this morning that lays out both sides.

14 So when the Court gets back to your chambers and
15 you have an easy 45 minutes to read, which I know you don't
16 normally have, both sides filed a joint status report on the
17 protective order. And so what we have teed up is these very
18 issues that counsel and I will talk about, so that you can
19 give us your guidance because we have reached an impasse. We
20 can't work this out. So what you are getting now, Your
21 Honor, is a preview of what you're going to read.

22 THE COURT: Well, I have not had time to read it,
23 and so you anticipated what I would likely have been asking
24 the parties to submit, so I'm glad it's already been
25 submitted. So we can review that and then potentially, if

1 needed, have further discussion with the parties before
2 making a call on what the protective order is going to look
3 like.

4 MR. YETTER: And so with that, Your Honor, if I
5 might make a suggestion, because I know the Court's schedule
6 is always very busy. Both sides -- this is a joint status
7 report. We've been working for a couple of weeks now on it.
8 Our -- the Google position is there, the States' position is
9 there on these three issues that I have been talking about.
10 I'm happy to deal with them all. But maybe you don't need as
11 much of a preview as a chance to read the submission, and
12 then maybe you call us back in, Your Honor, at your
13 convenience, and we will have this very discussion again and
14 we can get into the details. But at that point, you'll be up
15 to speed on where we're at.

16 So I'm happy to give you more of a preview, or we
17 can let you read and then we'll come back and argue it. It's
18 up to the Court.

19 THE COURT: Well, I wouldn't mind a preview at this
20 point, but let me just see if our court reporter needs a
21 break here before we do that.

22 (Court conferring with the court reporter.)

23 THE COURT: All right. So I think what we may do,
24 because I think it might be helpful in terms of just
25 efficiency, if you will both be able to give me a preview,

1 then between that and reviewing what's been submitted today,
2 I may not need to call you back.

3 So let's just take like about a ten-minute break,
4 and come back and we'll hear more on this.

5 MR. YETTER: Thank you, Your Honor.

6 THE COURT SECURITY OFFICER: All rise.

7 (Recess taken.)

8 THE COURT: All right. Please be seated. We're
9 back on the record in 4:20-cv-957, State of Texas, et al
10 versus Google.

11 When we left off, Mr. Yetter, I think you were
12 going to lay out Google's position on a couple of these
13 points regarding the proposed protective order.

14 MR. YETTER: Yes, Your Honor. I believe the filing
15 this morning is Docket 81, so it should be the newest filing
16 in --

17 THE COURT: Docket 83.

18 MR. YETTER: 83, excuse me.

19 So the two points that Google has raised is, one --
20 they're both disclosure points -- one, identity; and, two,
21 affiliation. So for the identity point, what Google is
22 proposing is that this protective order have in it all --
23 already it has it in by agreement that all outside
24 consultants and experts have to sign essentially a
25 certification; it's an appendix that says I've read the

1 protective order, I agree to abide by it, I'm subject to
2 enforcement by this Court of any breaches. That's already in
3 the protective order; that's agreed.

4 What we're proposing is that each side exchange
5 those signed certifications before they allow confidential
6 information to be provided to that outside expert or
7 consultant. And the reason for that, Your Honor, by giving
8 an identity, then the producing party has an ability -- and
9 this would be the same for third parties -- they have the
10 ability to speak up to say I have a concern; and if it's a
11 serious concern, to even bring it before the Court. I have
12 an objection to this particular person because I, as the
13 producing party of confidential business information, happen
14 to know or strongly suspect that that particular individual
15 who is about to get my confidential information works for a
16 competitor or works for a litigant against us, or some -- has
17 some reason that they -- that would increase the risk of
18 misuse of the information.

19 And that is not something that we made up, frankly.
20 Google didn't propose it in the Search cases because when
21 that protective order was negotiated, there had been no
22 disclosures to the New York Times and to the Wall Street
23 Journal; that happened literally days after the Search order
24 in D.C. was signed. But we're proposing it here because we
25 think it will have the preventive effect, it will have a

1 prophylactic effect. And as I said, it's not our idea. This
2 is common. It's common in the Western District for all civil
3 cases, and it's common in this district, Your Honor.

4 Chief Judge Gilstrap, as the Court probably knows,
5 in patent cases, has a standard template protective order,
6 and everybody in patent cases in his courts and in a number
7 of other courts in this district, including many of the
8 magistrate judges, have an obligation to get that what they
9 call an undertaking. The certification is signed by the
10 outside expert or consultant. And before giving that
11 consultant or expert confidential information, they have to
12 identify it, provide it to the other side, the producing
13 party, along with some other things that I'll get to in a
14 minute.

15 Now, the State of Texas has said, oh, wait a
16 minute, there are rules for when a litigant has to disclose
17 their testifying experts and there are rules that allow a
18 litigant to keep secret their nontestifying consulting
19 experts. And so by proposing -- making this proposal, we,
20 the Plaintiff States, would be hamstrung, our litigation
21 strategy would be compromised if we have to tell Google, or
22 Google has to tell them, about the outside consultants or
23 experts before they get confidential information.

24 The reality is, yes, in that respect, that
25 disclosure would mean you have to identify testifying experts

1 earlier, and identify consulting experts if the party wants
2 them to get highly confidential or confidential information.

3 And the tradeoff, Your Honor, is because in some
4 situations, there is such important competitive information,
5 like I think most practitioners would agree, in all patent
6 cases there is a concern that patent information could be
7 used by an adversary's patent prosecutors to -- for business
8 reasons. And in certain commercial cases, competition
9 cases -- antitrust cases being, at least I would submit, high
10 on that list -- there is a concern that competitive
11 information could be misused either by the plaintiff or third
12 parties or by some other parties in the case.

13 So the States have pushed back very vigorously that
14 they're not prepared to waive their right to keep their
15 consultants secret and to delay disclosing their testifying
16 experts. The reality, though, Your Honor, is that this --
17 these very States, including the State of Texas just a couple
18 of years ago, have entered into exactly this kind of
19 protective order.

20 And what we provide in the update, in the status
21 report to the Court, are the forms, really three basic
22 precedents that we provided to the Court: The Western
23 District template, Chief Judge Gilstrap's patent protective
24 order template; and by the way, this Court and Judge Mazzant
25 have entered protective orders in this division that have an

1 advance disclosure requirement as well; and then thirdly, a
2 protective order that the State of Texas and other states in
3 a multi-district litigation against the United States
4 Government entered into just two years ago -- two years and
5 three or four months ago, in the Northern District of
6 California. And in that protective order, which we summarize
7 for the Court on an exhibit to the status report -- well, we
8 excerpt it, we take out this particular clause -- it has the
9 very same advance notice.

10 The second objection or the second compromise that
11 the Plaintiff States have emphasized is they said, well, it
12 really shouldn't be the producing party who polices these
13 certifications, it should be the Court and the Court staff to
14 police it. And our response to that was that's not feasible
15 because the Court and the Court's staff has neither the
16 resources, nor the time, nor frankly the interest, to be
17 figuring out, from these certifications, does this disclosed
18 expert or consultant present a risk of misuse of confidential
19 information.

20 The Plaintiff States have said, we'll provide all
21 of the signed certifications to the Court, to Your Honor,
22 under in camera so that Google doesn't see them. And then at
23 that point, the Court would do nothing with them except keep
24 them there. And if there's a breach, we at least would be
25 able to go to Your Honor and have you give us the signed

1 certifications, presumably. Although, the Plaintiff States
2 today are objecting to that very relief that we asked for
3 from the December disclosures.

4 The problem with that is that that's relief once
5 the cows are out of the barn. And what we're looking for is
6 a provision that helps us prevent future disclosures. And so
7 while remedying a breach is important, we prefer to prevent
8 them in the future. And we do believe that if both sides
9 have the ability to police, to monitor, to speak up, if there
10 is an issue with a potential disclosure to a potential
11 outside expert or consultant, then that would be another step
12 forward in ensuring that this highly confidential information
13 produced by the parties and by third parties is kept
14 confidential as everyone agrees they should be.

15 One last point that the States have brought up that
16 I should mention before I move to the next disclosure request
17 that we're making is that, respectfully, reflects the problem
18 that we have. So in December, when the draft Texas complaint
19 was disclosed -- a portion of the unredacted complaint was
20 provided to the New York Times and the Wall Street Journal,
21 both of which are very big publishers that had been adverse
22 to Google in the past -- everyone agreed it was a significant
23 issue and that it had come from the investigative side of the
24 investigating States.

25 Google never saw the draft complaint, they never

1 had access to it. We still have never seen it, so it
2 couldn't have been from us. And despite that, we got push
3 back from the Plaintiff States as we tried to investigate it.

4 One simple question we asked was who, Texas, did
5 you allow to see the draft complaint? And Texas simply said
6 we're not going to tell you. We're not going to tell you who
7 the states or territories are that we gave access to. They
8 did say there was 35 of them out of 51. But we're not going
9 to tell you who. We're not going to tell who the outside
10 consultants or experts were; that's not for you to know.

11 Today -- and we still don't know, even today. And
12 we've asked again, would you tell us who those were. So we
13 sent letters, two letters, to every one of the 51 states or
14 jurisdictions that were in the multi-state investigation. We
15 got responses from many, but not all of them. In fact, we
16 didn't get responses from some of the Plaintiff States in
17 this case, from three of them, until last night after we
18 circulated our draft status report.

19 But what has now come up and what the States are
20 now suggesting, which as I said reflects our problem here,
21 Your Honor, and why we think this protective order needs to
22 be robust, is that the States are now suggesting that it
23 wasn't them at all; it wasn't anyone on the investigating
24 States' side; and that it was perhaps some sort of a
25 SolarWinds-type hack; that some Russian hacker, for whatever

1 reason, would go in and find the State Texas draft complaint,
2 and take ten pages out of the middle of the complaint and
3 send it to two major publishers, the Wall Street Journal and
4 New York Times. And so it's not the States' faults -- fault
5 at all; and for that reason, the protective order needs no
6 further protections of confidential information.

7 The information that was disclosed in December
8 wasn't just Google's, it was also third-party information.
9 So with respect, we don't think there's any -- we don't think
10 this new approach of denying that the disclosures even
11 happened, that the breaches even occurred, is an answer to
12 the fact that we need protections. And we're asking for two
13 reasons.

14 The second one, very briefly, Your Honor, as I
15 already mentioned, first, the identities, and then second --
16 that would be reciprocal -- and then, second, for the experts
17 and consultants that the Plaintiff States retain, that they
18 disclose whether they have an affiliation with a defined list
19 of Google competitors or complainants in the ad tech,
20 advertising technology, business focused on what we believe
21 is the relevant scope of this case, so that we will know, as
22 they provide those disclosures, who the person is and whether
23 they have -- for example, whether they are working for one of
24 the ad tech competitors of Google. We can say, then, Your
25 Honor, we have a concern. We would like to raise an

1 objection or we need extra protections or, frankly, we don't
2 think that person should get access to our data at all, given
3 the risks. We've suggested that.

4 We will say that other courts have similar
5 requirements. Chief Judge Gilstrap's template protective
6 order in patent cases requires that a curriculum vita, a
7 resume, of each of the potential recipients of confidential
8 information be provided, and others have similar
9 requirements. And all it simply does, Your Honor, is it
10 helps the recipient, the producing party, to understand is
11 there a particular concern here with this expert.

12 We think if identities are disclosed, which is a
13 very simple level of disclosure, that the extra affiliation,
14 which we would narrow down to a very defined list that can
15 simply be read and checked off by the potential expert or
16 consultant, would not be particularly onerous.

17 Last point on these two issues, and then I'll let
18 counsel raise their issue, is that these -- this is not meant
19 to limit who the Plaintiff States can hire. This is meant to
20 make sure that we don't have further disclosures in the
21 future. This is designed to make sure that if there are
22 risks, that we raise them beforehand so that we don't have a
23 disclosure, we don't have misunderstandings, so that
24 confidential information in this case can be shared promptly
25 and with confidence that it's going to be kept confidential.

1 If plaintiffs wish to have a secret consultant that
2 they never tell a soul about, they simply have -- they simply
3 need to make the choice not to provide them confidential
4 information of Google or third parties. This is as much of a
5 protection for Google as it is for third parties and as it is
6 for the States, assuming that the States have confidential
7 information to propose.

8 In this situation, I don't think the States believe
9 that their ox is being gored, because they're not providing
10 confidential information, they're gathering it from others.
11 And so their interest in protecting it perhaps is less, and
12 their interest in litigation, strategic litigation
13 advantages, perhaps is more. Thank you, Your Honor.

14 THE COURT: Thank you, Mr. Yetter.

15 Mr. Lanier?

16 MR. LANIER: Thank you, Your Honor. I think it's
17 good afternoon at this point.

18 Your Honor, I listen to this and I'm concerned.
19 I'm concerned because the idea that an unredacted complaint
20 was leaked, which is the way it was first vocalized today and
21 has been repeated, is itself not anything that we're certain
22 is true. What is true is that there was an unredacted screen
23 shot of a page of a complaint, and we know about that from
24 the New York Times and the Wall Street Journal. And we
25 discussed that before you last time.

1 We've continued our investigation. We certainly
2 did not leak it. No State of Texas employee has leaked it
3 that we've been able to determine or even reasonably think
4 of.

5 But what Google has done is tried to use that as a
6 lever to get an unfair advantage not just in this litigation,
7 but in broader litigation throughout the United States.
8 Because if you listen in detail and look in detail at what
9 they're asking for, they're asking for any expert that we may
10 use to consult simply as a consulting expert, to look at
11 code, to look at whatever they may -- at analytics, to look
12 at whatever they may need to look at.

13 If that expert is also consulting in an
14 investigatory action where another governmental entity is
15 looking at an investigation, or a private plaintiff is
16 looking at an investigation or, heavens, a foreign nation is
17 looking at an investigation -- if that person is consulting,
18 Google wants that consultant to have to disclose to Google
19 that they're consulting on other potential litigation that
20 may one day be filed or not be filed, that they're consulting
21 on investigations that may or may not be ongoing, to which
22 Google has no right to know. And it either intrudes upon
23 those other cases unfairly and unjustly or it limits the
24 field of experts that we're allowed to consult with.

25 To wear the guise of there was an unredacted leaked

1 page, therefore, Google's entitled to this information, is an
2 attempt to lever something which just isn't proper. To wit,
3 I offer the following responses.

4 Number one, on the Western District protective
5 order form, there is a difference. And I would urge this
6 Court, if the Court is going to be persuaded by the Western
7 District, there is a difference between Western District form
8 and Western District practice, at least so far as I've ever
9 been involved, and I believe with others, based upon our due
10 diligence work that we've done to this point in time.

11 Both the Western District and the Fifth Circuit
12 have said that parties need not disclose the identity or
13 opinions of nontestifying or consulting experts. And I think
14 that's true and accurate. So the idea that the Western
15 District should dictate this simply off of their form, then I
16 would say look to their practice if you are so inclined to be
17 persuaded by them.

18 Point number two. Judge Gilstrap does have a
19 patent order which has in its standard form a disclosure of
20 experts, not with all of the extra data per se. But that's
21 only in his patent order, it's not in his nonpatent order.
22 It would not apply to this case, if we were in Judge
23 Gilstrap's court, unless he chose to extend it.

24 Now, I haven't had an antitrust case in his court
25 before. The last antitrust case I had in the Eastern

1 District was back when Judge Folsom was on the bench. But
2 certainly in Judge Folsom's court, we weren't required to do
3 this. That reference of that case was Becton Dickinson --
4 actually, it was *Retractable Technologies v. Bectin*
5 *Dickinson*. And we certainly didn't have this requirement in
6 that court.

7 Point number four, or three. We have suggested an
8 in camera tender of whatever you think is important. And
9 while Mr. Yetter says that an in camera tender isn't adequate
10 because you don't have enough manpower to do the policing
11 job, he says it in the same time where he says this won't
12 take any big deal, it's just check off a list and see if
13 there's a concern.

14 Now, is his concern an improper leak or is his
15 concern getting insight into who the experts are? Because if
16 his concern is an improper leak, you've got all the power and
17 authority there is. And, ultimately, it's not going to be
18 anything that Google can do; they have no authority and no
19 power over an improper leak.

20 If they see our experts that are consulting only
21 and they get that insight into them, or if you read it as
22 they've written it, they find out, oh, Lanier's going to mock
23 try this case or he's going to have a jury consultant who is
24 going to look at this, that, and the other, and they get that
25 data, what are they going to do? Are they going to tell me

1 I'm not allowed to hire that person? Well, they can't do
2 that. Are they going to come to you and say, don't let
3 Lanier hire this person? And you're supposed to be in a
4 position then of saying, oh, wait a minute, maybe Google
5 doesn't like this person's other work, so you can't hire him,
6 Mark? Or are they going to come to you and say, we're real
7 suspicious about this person, so will you really put the
8 hammer on 'em and put something really restrictive down like
9 a computer tracer on their computer? You're not going to do
10 that either.

11 All the enforcement is yours. You've got the only
12 enforcement power, but you've got it. And if you find
13 someone's violating your protective order you've signed, you
14 can send them to jail, you can fine them out the wazoo.
15 You've got all the power in the world, but it's yours.

16 And so we offered, as a compromise, to avoid this
17 hearing, that we will submit in camera to you signed, sealed,
18 and delivered CVs; as much, as little, data as you want with
19 anybody who is going to see anything confidential or highly
20 confidential. And we think that resolves everything without
21 giving an undue advantage to either side, because both sides
22 can do the same thing.

23 So we believe the solution to be the power of the
24 Court. We think that everything else is unfair, unnecessary,
25 and is a levered attempt to get an advantage in the

1 litigation that they shouldn't get.

2 THE COURT: Let me ask you two quick questions --

3 MR. LANIER: Yes, sir.

4 THE COURT: -- before you wind up. The first is,
5 as I understand what Mr. Yetter is suggesting, the purpose
6 would be that the information on an expert or whoever that is
7 going to get the information, is going to be disclosed to the
8 other side, I suppose, with some sort of sufficient time
9 built in that if they had a concern, they would raise it with
10 you. And if you couldn't resolve it, they would raise it
11 with the Court, and I suppose the request would be, please
12 prevent plaintiffs from sharing this information with this
13 individual or this entity for X, Y, and Z reasons. Is that
14 generally -- is that your understanding of what's being
15 proposed?

16 MR. LANIER: I think that's exactly what's being
17 proposed.

18 THE COURT: All right. And so the second question
19 is you've talked about some of the justifications that Google
20 provided for entering that type of protective order,
21 including the Western District practice, and the Eastern
22 District or other districts, but he also mentioned that he
23 felt the State of Texas had entered similar agreements in
24 other cases. And I wanted to get your response on that.

25 MR. LANIER: Your Honor, I think he's suggesting

1 the Affordable Care Act case that Texas agreed to disclose
2 experts, and that's certainly a different case. It's
3 certainly got different parties. It's -- and by that, I
4 don't mean the State of Texas is different, we are not, but
5 what I mean is the defendants are quite different.

6 Google is a data mining company. We google things
7 because they have mined data. Their Gmail accounts are set
8 up with an ability to mine data. Judge Koh expressed great
9 concern, in the Northern District of California, at a hearing
10 just a few weeks ago that was reported in Law360 -- I wasn't
11 at the hearing, but she quoted that she was, quote, deeply
12 disturbed by the Google lords tracking her court site.

13 And this is a different situation which calls for a
14 different approach by the State of Texas. I mean, I've
15 probably got a boatload of cases where I may not mind a
16 mutual disclosure of experts. But in a case like this, we
17 absolutely oppose that.

18 Now, the other side of the coin, though -- you
19 asked me a very good question, but there is another side to
20 it. And the other side to it is why didn't Google require
21 this in the DOJ case? They negotiated that protective order.
22 They didn't require it there. They didn't require it in the
23 Colorado case, though that was a negotiated protective order,
24 also. And their answer is, well, but we didn't have the
25 leak.

1 This is not about a leak when they're making the
2 argument Mr. Yetter's made to you of let's find out who the
3 experts are because if we don't like that expert having
4 access to our information, we want to be able to strike the
5 expert. That's why I say that the leak is a lever to try to
6 get you to enter a protective order that they've said they
7 don't need in the DOJ case, that they don't need in Colorado.

8 So I think that it's an issue of looking at Texas.
9 Texas did agree to it in the *Affordable Care Act* case, but
10 those are different parties and a different case. And if the
11 parties agree to waive that confidentiality, God bless them,
12 let them go straight. But we won't make that agreement here
13 because we think here, in this case, against the data mining
14 company, it gives them a substantially unfair advantage
15 against us.

16 We believe it will also inhibit a number of our
17 experts from even working in the case. Because if an
18 expert's working in another investigation, let's say there is
19 a case looming out there -- and I've got one that comes to
20 mind, simply because they've asked if we can share an
21 expert -- and that case I won't even say, give a hint of,
22 what it is. But I'll tell you that if the expert has to
23 disclose, oh, yes, I'm also working in another case on behalf
24 of these plaintiffs and investigating Google for this, that,
25 or the other, that expert will flat shut the door to us. And

1 yet, we need that expert to help us navigate through the
2 labyrinth of data and information and processes that make
3 Google what it is, and that form the basis of this complaint.

4 And so I think in short, this is an unfair
5 advantage. I think it's an advantage they don't need. I
6 think it's an advantage that is hiding under the illusion of
7 some unfortunate wrongful disclosure of a screen shot of
8 confidential information in a case, in a complaint. But I
9 don't think anybody's insinuating that an expert did that.
10 And I don't think that even the investigation that Google's
11 done has been very in depth, because we know there are a
12 number of names we've given them that have not been
13 investigated by them, of people who saw the complaint.

14 And the three that didn't answer until late last
15 night is because -- those three Plaintiff States is because
16 Google didn't tell us until recently that those had not
17 answered. And so we sent out an email, please answer. You
18 had asked us to put together a network to deal with these
19 issues. We've done that, and this was part of the network.
20 And we got them the answer almost immediately once they told
21 us they had not heard from those states.

22 So the last point that Mr. Yetter left for me to
23 cover was what we had asked for in this case, and we had
24 asked for a protective order that stops Google from
25 data-mining anybody associated with the plaintiffs' team.

1 And Mr. Yetter previewed his argument to that by saying that
2 basically Mr. Lanier is just saying, um, don't do something
3 illegal.

4 But I will tell you that the argument that Google
5 made in the Northern District case that I was referencing
6 before, in front of Judge Koh, that as written by Law360,
7 quotes Google's counsel in that case, Stephen Broome of Quinn
8 Emanuel, argued that Google tracks users in order to serve
9 clients who use Google analytics on their websites; and,
10 therefore, Google's activity is shielded from Wiretap Act
11 violations under the ordinary course of business exemption.

12 So if Google data-mines and believes they're
13 shielded from the wiretapping clause because of that, as
14 represented by counsel reported by Law 360, but put it in
15 quotation marks, if in fact that is the position of Google,
16 then all we're asking for is please say that you will not
17 data-mine on any of the plaintiffs in this case, or any of
18 the witnesses in this case, or any of the experts. And
19 that's our request, and it's one that they won't agree to do.

20 And so those are the issues as seen from the State
21 of Texas. And I thank you for giving me this time.

22 THE COURT: I have -- Mr. Lanier, I have one more
23 question for you, and I'm going to follow up with Mr. Yetter
24 on this briefly.

25 Coming back to the disclosures with regard to

1 individuals receiving confidential information and this
2 affiliation issue, I want to make sure I understand what that
3 additional requirement looks like. It is a disclosure of
4 affiliations. I understood Mr. Yetter to be talking about
5 affiliations with competitors or something like that, as
6 opposed to people affiliated with investigations from their
7 governmental entities.

8 MR. LANIER: Your Honor, they've asked for signers
9 to disclose three things. Number one, competitive relations,
10 which is what you've understood Mr. Yetter to say.

11 Number two, any involvement in adverse litigation;
12 that would include as a consultant that doesn't have to be
13 listed, for example, under the DOJ protective order. So if a
14 consultant's working for us here, they've agreed DOJ doesn't
15 have to disclose it. But if that consultant's also working
16 for the DOJ, then it will have to be disclosed here, and it's
17 a way around that DOJ protective order.

18 And then the third are people involved in any
19 investigation. So it doesn't have to be active litigation,
20 it can be pre-litigation stage, and that will give them
21 insight into that.

22 Those are the three areas that they have asked the
23 signers to disclose, Your Honor.

24 THE COURT: And so the last followup I have for
25 you, and for Mr. Yetter, is that he had also mentioned what I

1 suppose is an alternative in terms of that additional
2 information. He spoke about individuals who would be
3 receiving that information providing a CV. Now, a CV might
4 very well not have that kind of information included in it,
5 it would have the things we typically see in a CV included in
6 it.

7 I suppose I know the answer to this. I know that
8 the States generally are still not comfortable with that,
9 but -- or would the States be more comfortable with that?

10 MR. LANIER: Your Honor, I guess, I mean, that's --
11 would we be more comfortable if it would be a number 10 on
12 the FBI's most-wanted list than number 5? Yes. But we would
13 not be very comfortable with it regardless. I guess it would
14 be more comfortable. We would certainly love to give that in
15 camera to you. That would not be any problem at all.

16 We'll give you anything in camera on any of these
17 people in any way, shape, form or fashion they want, as long
18 as it's in camera. And if you deem it one where you believe
19 it's important that Google have it, and we look at it in
20 detail, then we can have a hearing, we will argue -- you have
21 all the power in the world, and we have all the confidence in
22 the world.

23 THE COURT: All right. Thank you, Mr. Lanier.

24 MR. LANIER: Thank you, Judge.

25 THE COURT: So, Mr. Yetter, I have a follow-up

1 question for you that's raised by what your friend on the
2 other side was just saying, which is that if there had been
3 no leak in this case, in this case would Google be seeking
4 these protections regarding this order?

5 MR. YETTER: Your Honor, I think absolutely we
6 would not, because we negotiated a protective order in the
7 Search case without these protections, but it was literally
8 days later that there was a leak here.

9 And if I could correct the very able arguments of
10 my -- of my colleague, it wasn't just a screen shot. And
11 we've never seen what the New York Times or Wall Street
12 Journal got, but what they published in the newspaper was far
13 more than just one page. It was, as best as we could tell,
14 ten pages out of the middle of the draft Texas complaint that
15 had confidential information on both Google and third parties
16 in there.

17 Now, what I didn't hear counsel say, and maybe
18 they're not pursuing that argument anymore, is that this
19 somehow was a Russian hacker that got in there. This had to
20 have come -- this disclosure had to have come from someone on
21 the investigating States' side, and it had to be from one of
22 the 35 states or territories that Texas had told us had
23 access to the draft complaints.

24 Now, what the State hasn't told us, and what we
25 don't know, is that how many of the consultants got access to

1 the draft Texas lawsuit. And we have to believe -- that's
2 why they hired them -- that many of them, if not all of them,
3 have it. And that's the issue here, Your Honor.

4 So what counsel's talking about, why are we focused
5 on experts and consultants, well, they're the ones that can
6 have mixed agendas, mixed allegiances. The employees of
7 the -- I'll just pick Texas as an example -- the Office of
8 the Attorney General, their allegiance is just to the State
9 of Texas, their job is to work for them, but consultants can
10 work for lots of people.

11 And one of the things we know in this case, Your
12 Honor, and this is in the report, you'll see more detail on
13 it, one of the consultants that Texas hired worked at length
14 and very publicly for News Corp, the parent company of the
15 Wall Street Journal, which has been over the years a very
16 vocal, publicly vocal, opponent and a very big publisher
17 against Google. And that is exactly the sort of consultant
18 that we would have raised a flag and said this is a problem.

19 So what we're suggesting -- and I agree a
20 hundred percent with what counsel just said -- is this Court
21 holds all the power to punish a breach, but we would much
22 prefer to prevent a breach than punish one.

23 And so the alternative that they suggest that
24 somehow this, Your Honor and your staff would have to be
25 sifting through resumes of experts and consultants to see if

1 something bothers you about that consultant, that that
2 consultant may have a mixed allegiance, a mixed loyalty, that
3 could raise the risk of misuse, is not a workable
4 alternative.

5 Now, if the Court wants to limit this to outside
6 counsel for -- on both sides so that counsel can raise
7 concerns, that would probably be a fine compromise there.
8 But it doesn't make sense for the Court to have to police
9 issues that the Court just doesn't have background on.

10 Now, as a producing party -- now, these protective
11 orders are protective orders in the Eastern and Western and
12 Northern District, they protect the third parties as well.
13 And so if you're going to give third party data, you have to
14 give them advance notice. And so the protective orders are
15 more -- this advance disclosure is more than just protecting
16 Google; although, that's what we're here on behalf of.

17 Now, as the Court asked the question, you give some
18 advance notice, in the Eastern District it's ten days; in the
19 Northern District, that *Affordable Care* case that Texas
20 agreed to the very advanced disclosure that we're asking
21 about just two years ago, it was five business days; in the
22 Western District it just says advance, prior to disclosure
23 you have to provide the notice.

24 And the point of that is simply this. The
25 producing party is in a better position to raise an

1 objection. Raising an objection, the Court could say I'm not
2 concerned about that objection, or impose some additional
3 restrictions. But the point is let's prevent disclosures,
4 not punish breaches, and that's what we're trying to --
5 that's what we're suggesting here, Your Honor.

6 Just, if I may, a couple of responses to what
7 counsel argued. This is not about jury consultants. If we
8 want to take jury consultants off the list, I'm fine with
9 that. We can -- this is not who we're worried about. I
10 don't believe jury consultants is the issue; it's outside
11 experts and consultant who work for others in the industry.

12 Now, one of the things that counsel brought up that
13 these consultants may be working for someone else that's
14 about to bring a lawsuit against Google, that's exactly the
15 situation that would warrant heightened protections. Because
16 one of the things that the -- we agree on a lot. One of the
17 things the parties agree on is that whatever information is
18 disclosed and exchanged in this case stays in this case and
19 cannot be used for other cases or other matters, or certainly
20 for business matters.

21 And so if one of these experts or consultants that
22 the State of Texas or the Plaintiff States decides to hire is
23 working for another potential litigant against Google, that
24 raises exactly the risk of misuse that we're focused on; and
25 at a minimum, that expert or consultant should disclose that

1 we believe, to Google or to the producing party so that we
2 can raise it with the Court if we have a concern.

3 But it's the additional risk that we're focused on
4 here, Your Honor. If a consultant or expert has another
5 agenda or loyalty that could raise the risk of misuse, this
6 would show it, this would -- maybe not perfectly, but this
7 would be a step in the right direction. That's why we're
8 asking for it, Your Honor.

9 And this, counsel's suggestion that this is all
10 about somehow compromising the Plaintiff States' litigation
11 strategy is off the mark because this is a mutual exchange of
12 information. They would learn about our outside consultants
13 and experts just like we would learn about theirs. They
14 would have the ability to object to ours just like we would
15 have the ability to object to theirs. Neither side gets an
16 advantage, certainly not an unfair advantage. No more than
17 when the State of Texas agreed with the DOJ in the *Affordable*
18 *Care Act* case that they would exchange experts and
19 consultants. No more than in every one of Judge Gilstrap's
20 patent cases does one side get an unfair advantage over the
21 other.

22 And the reason I would suggest that patent cases
23 have it as a standard in the template is because of what I
24 mentioned earlier. Patent cases have this very important
25 inside technical information, source code, things like that

1 that could be misused. Not every civil case has that. A
2 breach of contract case doesn't raise that risk. A
3 competition case, an antitrust case, which involves discovery
4 from competitors and potential competitors and other parties,
5 involves that very risk. And that's why in this case it's a
6 reasonable, limited, and appropriate additional protection
7 given the what was once an admitted breach that has already
8 occurred.

20 There is no question that Google has privacy
21 policies and disclosures that it gives to all of its
22 customers, and tells them exactly what information Google
23 collects, for the customers' use or the customers'
24 protection, or for advertising purposes, or to make their
25 products better. There is not a single reference anywhere,

1 and the plaintiffs do not provide this, that Google has any
2 right to somehow gather -- target, gather, and use
3 confidential communications of their adversaries in
4 the courtroom. And that's what the request that the States
5 have now made, we believe not for out of their own legitimate
6 concerns, but really to -- perhaps for media concern, media
7 efforts, to aggrandize their position, to denigrate Google,
8 to make a splash.

9 One of the things that the Court will see in the
10 status report is after the last hearing where this whole
11 issue of data mining was first broached by counsel, State of
12 Texas had a series of press conferences right after the
13 hearing ended, and this topic of Google data mining and
14 searching emails of litigation adversaries, and how the State
15 of Texas has told its lawyers don't use Gmail during this
16 case, they went over and over it again. And respectfully,
17 Your Honor, they have given no evidence to the Court or to
18 us.

19 Because we've asked them over and over again where
20 does this come from? Why are you demanding this? Now that
21 there's been a breach that came from your side, now that
22 we've got a protective order and you're trying to avoid
23 additional disclosures, why are you asking for this provision
24 that essentially accuses Google of spying on its litigation
25 adversaries? On what basis do you have? And we've gotten

1 none. And, respectfully, we don't think it's a legitimate --
2 frankly, it's an outrageous request. We don't think there is
3 any basis for it, and we've responded to it in the papers.

4 So to boil it down, Your Honor, what we think, this
5 is the kind of case, given the stakes, given what the
6 plaintiffs themselves have said are the importance of this
7 case, the competitively sensitive information that's going to
8 be exchanged, we need a robust protective order, we need more
9 than the standard protective order which we already had in
10 place before the last disclosures and breaches. And these
11 two provisions, whether it's a resume or disclosure
12 affiliations, these two provisions are both reasonable and
13 targeted and help -- and we believe will help prevent
14 disclosures and breaches in the future.

15 If the Court has any questions, I'm happy to answer
16 them.

17 THE COURT: No. Thank you, Mr. Yetter.

18 Mr. Lanier, if you have any last comments, you can
19 make those at this time.

20 MR. LANIER: Thank you, Your Honor. I'll be brief.
21 I appreciate your patience.

22 Number one, it's important the Court know, and
23 we'll put it on the record, the breach that's been alleged
24 and apparently happened was not a breach from a consulting
25 expert. Our experts had not been provided Box reader. So it

1 had to be one of the States that were provided it to see if
2 they had come into it, or some type of a hacker.

3 I don't know all of the mysteries of hacking, and
4 it seems almost TV-ish, but I do know that Jones Day has been
5 reportedly recently hacked and that a number of their
6 briefing ended up on the web. It's not unheard of. It
7 happens all the time. I have no clue.

8 This is Google's situation, but this is not a
9 situation where an expert leaked anything at all. Experts
10 didn't have that Box reader, which is what the screen shots
11 evidently came from.

12 Second point, heightened protection. You cannot
13 get any greater protection than this Court and the criminal
14 justice system. And this is not a situation where there must
15 be all of these rogue consulting experts out there who are
16 looking to disseminate to the press or to competition, in
17 violation of a sworn commitment to keep confidential
18 information. I think most consulting experts take those
19 oaths and that verification extremely seriously, because if
20 the consulting expert is found derelict or unfaithful to that
21 affirmation, it destroys their business. I mean, they'll
22 never get to work again. So I think again that's just a
23 lever, that's just an explanation.

24 Point number three. Mr. Yetter keeps saying that
25 this doesn't give them an unfair advantage because they're

1 willing to do the same thing. Well, it absolutely does.
2 They don't have experts to designate to us, consulting
3 experts, that are investigating whether or not the State of
4 Texas might be guilty of this, that, or the other. And so it
5 doesn't restrict their access to the small pool of experts
6 that are truly available out there.

7 But if this burden is put on us, it will restrict
8 our ability to get experts, because there will be a number of
9 experts, several I know of, that will say we're not going to
10 disclose, we're not allowed to disclose, under
11 confidentiality agreements. We're not allowed to disclose
12 that we're doing investigatory work for plaintiff --
13 potential plaintiff A, B, or C. So it's not, ah, this is
14 equal playing field for each side; it is not even remotely.

15 And then my last point, and I appreciate your
16 patience as I say, is on the data mining. The terms of
17 service agreement that Google's entered into with everybody
18 who opens up those accounts and uses Google, give them
19 permission to do it. And if they don't want to do it -- this
20 isn't about a press conference. We do -- we're the State of
21 Texas. We are here on parens patria, and we are a --
22 patriae. We are here for all of that. And there are going
23 to be press conferences because that needs to be reported
24 out.

25 But what happens is those press conferences are

1 questions asked by the media. We don't dictate what they
2 write or what they ask about. And I'm sure everybody's very
3 interested in this and why Google will not just readily
4 agree: No worries, no data mining, we'll put it in writing.

5 Thank you, Judge.

6 THE COURT: All right. Thank you, counsel. I'm
7 going to look at the filing in docket 83, and appreciate your
8 arguments on that issue.

9 The last item I want to cover today briefly is
10 related to the protective order in the sense that it is the
11 OGP. I have a filing that is document 80 from counsel that
12 I've requested concerning your positions on any alterations
13 that might need to be made on our dates or substance of the
14 OGP. So I have that and appreciate it. I will say that I'm
15 glad to see that you've agreed on the lot, including dates in
16 the near term.

17 I have reviewed the position of both parties
18 concerning Google's request that there be somewhat of a
19 delay, I suppose, in Google's disclosures or that Google's
20 disclosures come after the State has delivered to Google
21 these investigative materials.

22 MR. YETTER: We're actually not asking for a delay,
23 Your Honor. Sorry.

24 We are -- we, Google, are perfectly fine to have
25 our initial disclosures on April 23. But the Plaintiff

1 States told the Court on February the 4th that they would
2 move with all expediency as quickly as they can to get us all
3 that they have on their investigative materials. As the
4 Court knows, the States have about an 18-month head start on
5 us. That's a substantial lead. And what we're asking is
6 that both sides get to the starting point together. If I
7 have that much of a lead, I would want the race to be short.

8 And so all we're saying is we ask the States to
9 give us what they said they would, which is their
10 investigatory file. If they do that this coming week, then
11 we can be on target by April 23rd to file our initial
12 disclosures. They haven't given us anything so far. And if
13 they continue to delay, all we're asking the Court is to have
14 our initial disclosures timed 30 days after the States give
15 us the promised investigatory materials so that we can start
16 to cut into that 18-month head start that the States have,
17 and we can get closer to getting to the starting line
18 together. That's our request, Your Honor.

19 THE COURT: Right. And I will hear from
20 Mr. Lanier.

21 Mr. Yetter, one question I had for you is, as I
22 read your position and as you've stated it today, you note
23 that the States have been doing this investigation for some
24 time and so they have, I guess you put it, an advantage on
25 you in terms of starting out of the gate.

1 But two things that struck me are, number one, both
2 sides are going to be able to supplement your initial
3 disclosures. And my anticipation would be that Google will
4 able to supplement and might have good reason to supplement
5 as and when you receive all of those investigative materials.
6 That was the first thing that struck me.

7 The second is that, and I think your colleague
8 pointed it out earlier this morning, you know, the amended
9 complaint is 450 paragraphs, it's 145 pages, and it's quite
10 detailed. So from where I sit, it seems like you have a lot
11 of information from the other side regarding the kinds of
12 materials that you would need to make in your initial
13 disclosures, and you will be able to supplement.

14 Now, I agree with you that the State had said it
15 would produce expeditiously all materials that you've
16 referenced, but I do wonder whether we need to necessarily
17 delay these anticipated deadlines if it is taking the State
18 longer or if what we anticipate is Google may need to do more
19 supplementing as it receives more material.

20 MR. YETTER: Both very good points, Your Honor.
21 Two responses. Perhaps what we can get from the State -- on
22 February 4th, and I thought very forthrightly, counsel said
23 we are going to go as quickly as we can, we're going to
24 expeditiously give to Google all the investigatory materials,
25 and offered *I want you to follow up with me at every hearing.*

1 So I'm following up with him at every hearing.

2 Perhaps what we can get from the State is a
3 deadline. We will get you the investigatory materials on X
4 date. What they have proposed to us is they'll give them to
5 us on their initial disclosures date, which is April
6 the 23rd, which would be ten weeks after they told the Court
7 they were going to give them to us as quickly as possible,
8 and about four and a half months after filing the lawsuit.

9 THE COURT: Mr. Yetter, have you received any of
10 their investigative file materials at all?

11 MR. YETTER: Nothing, Your Honor. Zero. The
12 reason why we're asking for them now -- and the Court is
13 exactly right. We could do initial disclosures based on the
14 new complaint, which is different, it is different from
15 the -- they changed a whole bunch of things. But what we
16 were trying to do is give more helpful, targeted, useful
17 initial disclosures that we felt better about that might be
18 more useful to the other side.

19 Now, again, without the investigatory materials, we
20 will do the best we can. And if that is what the States
21 insist upon and if that's what the Court thinks is
22 appropriate, we definitely would supplement in the future,
23 and we would do it that way. But what we're trying to do is
24 get the States to give us that information. We don't want to
25 be 18 months behind the entire case.

1 I have a very strong suspicion that once this case
2 gets started, the States will be pushing for discovery very
3 quickly, and we'll be then dealing with digesting the
4 investigatory materials, 18 months of them, 3,000,000 pages
5 of them -- some of which is our material, admittedly -- 64
6 third-party witnesses, at the same time we're dealing with
7 what the State has said their first request is going to be,
8 which was this very broad CID from last summer.

9 So we would like to just get caught up. We would
10 like the States to give us that material as quickly as they
11 can. We're ready to do our initial disclosures. We think
12 they're going to be more productive and more useful, more
13 efficient, if we at least have time to digest the
14 investigative materials beforehand. Thank you, Your Honor.

15 THE COURT: Thank you, Mr. Yetter.

16 So, Mr. Lanier, Mr. Yetter has correctly quoted
17 from our -- from the transcript of the last hearing. I know
18 that the State had promised to expeditiously produce these
19 materials. So if it's accurate that none of it has been
20 produced yet to the other side, I will say I'm a bit
21 surprised.

22 MR. LANIER: I don't think it's accurate, Your
23 Honor. It has not been produced by us. It has been produced
24 by DOJ. DOJ has given them gazillions of the documents at
25 this point in time. They are the same basic documents that

1 we've gotten. These are the documents that come from Google
2 that Google has given to us and to DOJ. We haven't turned
3 around and said -- you know, send an email that says, *yeah,*
4 *what they said.* But we recognize the DOJ has been doing
5 that, was in the process of doing that, and we've been
6 communicating with DOJ about that to make sure that those
7 documents were being provided to Google. And so Google's
8 gotten the benefit of that.

9 To the extent that not wanting to rehash anything
10 in 1404, but if this is supposedly duplicative litigation of
11 everything going on everywhere else, they already ought to
12 have a good handle of what's going on enough to make their
13 initial disclosures. The problem that we've had is twofold.
14 Number one, we can't get a protective order in place such
15 that we're able to give certain sets of documents because
16 we've got those protections in place. And so we're still
17 waiting for that from them. But we're able to still give
18 them back their documents, and that's been done by DOJ; and,
19 frankly, that's 90 percent of the discoverable investigatory
20 materials.

21 If they want a list of the people that we've taken
22 some statements from and things of that nature, we can try to
23 compile that as well, but that's really small.

24 In the conference we had over this, Mr. Yetter and
25 I discussed it, and I said please explain to me what you need

1 and why you need it now before initial disclosures, because
2 it seems to me that we're going to give you the names of
3 everybody in the initial disclosures. Does it make any
4 difference if we need to cobble that together right now?

5 And his reply was -- if I understood him right, his
6 reply was, well, we want to tailor our initial disclosures
7 down narrowly to where you've done your investigation. And I
8 said, no, no, no, no, no, no. Your initial disclosures are
9 based upon our pleadings. You know, we don't investigate and
10 then narrow the field so that now you only disclose off of
11 our investigation; that will necessarily quench the need to
12 full disclosure. And he said, well, you know, we think that
13 it would be better for you if we didn't give you everything,
14 if we just gave you the stuff that's relevant to what you
15 were investigating. And I said no, no, no, please, we want
16 full initial disclosures. And so that's part of the issue as
17 well.

18 But in short, we're glad to give them what they're
19 entitled to. If they want us to reproduce what the DOJ has
20 given them on their documents, I think we can probably do
21 that within a week or ten days and I'm glad to do that. But
22 it's just going to be a, yeah, *what they said*. And we're
23 prepared to move forward with initial disclosures pretty
24 quickly.

25 THE COURT: Let me stop you for a moment --

1 MR. LANIER: Yeah.

2 THE COURT: -- because I do want to make sure that
3 I understand this point. And it's where you began,
4 Mr. Lanier, which is that what I hear you saying is much of
5 what is being referenced as the investigative file of the
6 State of Texas is comprised of documents that you're saying
7 DOJ has already produced to Google. And so it sounds like
8 your suggestion, number one, they already have a lot of these
9 materials; and, number two, I suppose do we need to have a
10 duplicative production, a full duplicative production, or can
11 the parties work out something along those lines where you
12 wouldn't have a duplicative production.

13 MR. LANIER: That's -- you hit the nail on the
14 head. That's true. And these are also, by and large, most
15 of the documents are documents Google gave us to start with,
16 but there are some additional documents.

17 THE COURT: All right. So, Mr. Yetter, is -- so
18 from Google's standpoint, it sounds like you do have at least
19 some body of materials that are part of the investigative
20 file, or would you say that's incorrect.

21 MR. YETTER: Unfortunately, Mr. -- counsel is
22 mistaken on that. What he's talking about is the DOJ, which
23 is in the Search case, has produced its investigative file on
24 the Search case to Google in D.C. That is a different file
25 than -- that's Search and Search advertising up in D.C. That

1 is not the investigative file for the ad tech case, at least
2 that's not what Texas has led us to believe, which is the
3 3,000,000 pages, 64 third-party witnesses; and we've gotten
4 none of that.

5 So, yes, I would agree some of that we presume is
6 information that Google provided to the State. But we've
7 gotten nothing from the third parties on their 18-month ad
8 tech investigation, the case that we're here about now. So I
9 think counsel is just flat wrong that the DOJ has been
10 producing the Texas investigatory file; it hasn't.

11 Second, counsel said, well, we've been waiting for
12 a protective order. Well, as the Court will recall, we've
13 already got an outside-counsel-only arrangement as to the
14 unredacted complaint, and we could -- we're certainly happy
15 to get the investigative file on an outside-counsel-only
16 basis, today or any day.

17 And lastly, counsel mentioned that on Monday when
18 we met and conferred about this issue, that he said, why do
19 you want the investigative file? And we said, well, we want
20 it -- and I absolutely agree -- we said we would like to
21 tailor our initial disclosures to what's relevant in this
22 case. And as of Monday, we were dealing with the original
23 complaint. In fact, in that same conversation we asked the
24 States' lawyers, are you filing an amended complaint today
25 and can you give us a heads up on what's in it? And they

1 said it's not finalized yet, so we can't give you that heads
2 up.

3 So it is, yes, the amended complaint has been
4 changed in many ways and it's been supplemented and added.
5 We -- none of us knew that on -- at least on the Google side,
6 on Monday. And absolutely we want to provide initial
7 disclosures that are focused on the relevant issues.

8 As the Court has pointed out, the amended complaint
9 is very long and very detailed. We could do our very best to
10 do initial disclosures on that. But as to whether we have
11 the Texas investigatory file, we do not. As to whether we
12 need -- and we would love to get the protective order files,
13 we definitely do, but is it holding it up? Not at all
14 because we can take these materials on an
15 outside-counsel-only basis.

16 THE COURT: All right. Well, it does sound to me
17 like at least where you stand right now, for both sides, is
18 that whatever was produced in the Search case, there is a
19 concern that there needs to be production -- there may be
20 similar, some -- at least some similar materials produced in
21 the Search case, and even though the subject matter here is
22 not the same, but I can see similar materials being produced,
23 some amount of similar materials being produced. But
24 regardless, it sounds like we would need to do a production,
25 it sounds like, of the State investigative file to Google,

1 again for the reasons I've stated.

2 And I'm going to consider the joint advisory in
3 terms of an OGP, but I do think that the amended -- the
4 complaint and now the amended complaint are quite extensive,
5 quite detailed, and Google will be able -- both sides will be
6 able to supplement; and needless to say in this context, the
7 Court will understand that a lot of supplementation may be
8 necessary as investigative file materials are delivered, and
9 that that may be happening over time because whatever part of
10 that investigative file may need to be held until there is a
11 protective order in place, could delay some of the necessary
12 supplementation.

13 So unless -- do the parties have anything else you
14 think we need to discuss today?

15 MR. YETTER: Happily, no, Your Honor --

16 MR. LANIER: Not for plaintiffs, Judge.

17 MR. YETTER: -- from the defense side.

18 THE COURT: All right, counsel. I think, most
19 likely, I will probably go ahead and try and get the OGP done
20 and in place, even if we haven't quite gotten the protective
21 order done. We'll try and get the protective order done
22 quickly.

23 If there is a delay in the protective order and we
24 need to look at making an adjustment on the OGP, we can do
25 that after the OGP goes out.

1 All right. Thank you, counsel. We stand in
2 recess.

3 MR. YETTER: Thank you, Your Honor.

4 MR. KELLER: Thank you, Your Honor.

5 (Adjourned at 1:18 p.m.)

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